Supreme Court, U.S.
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In the
Supreme Court of the United States

Rainbow Construction Company, a partnership; RCMC, Inc. d/b/a Rainbow Construction Company; Peter A. Richardson; Douglas V. Anderson; Clifford Michael McClure; Helon L. Chichester; James Lambert; and Christian Hans Weissleder,
Petitioners,

v.

Richard Robert Radcliffe; Charles Melvin Taylor; Andrew Slivka, Jr.; and Jay Streets,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRADFORD K. NEWMAN
WILSON, SONSINI, GOODRICH & ROSATI
650 PAGE MILL ROAD
PALO ALTO, CA 94304
(650) 320-4787

HENRY F. TELFEIAN
Counsel of Record
LAW OFFICE OF HENRY F. TELFEIAN
1247 ALVARADO ROAD
BERKELEY, CA 94705-1545
(510) 848-0542

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

93pp

QUESTIONS PRESENTED

1. Whether the National Labor Relations Act ("NLRA") preempts union officials' tort claims for false arrest, false imprisonment and malicious prosecution against an employer where adjudication of the tort claims requires a state court or jury to interpret the NLRA and decide whether the union officials were "engaged in lawful union activities" permitted by the NLRA?

2. Whether the NLRA preempts a California trespass statute that empowers the State to interpret the NLRA and determine what conduct constitutes lawful union activity?

PARTIES TO THE PROCEEDING

The caption sets forth all parties to the proceeding with the exception of Jack Daniels, Susan Massini (in her individual capacity and in her capacity as Mendocino County District Attorney), Allen F. Bazzani, the County of Mendocino, the Ukiah Unified School District, and the Associated Builders & Contractors (Golden Gate Chapter), all of whom prevailed in the courts below and are not, therefore, petitioners.

At the time of the events giving rise to this action, Petitioner Rainbow Construction Company was a general partnership and the other named Petitioners were partners thereof. At the time the Complaint was filed with the United States District Court, Rainbow Construction Company had become a fictitiously named d/b/a of RCMC, Inc., but was improperly sued as Rainbow, Inc.

RCMC, Inc. is a privately held corporation, with neither parent company, nor any wholly or partially owned corporate subsidiaries.

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I.

OPINIONS BELOW

The published Opinion of the Ninth Circuit Court of Appeals resolving the preemption issue (Pet. App. "A", pp. 1a-35a, *infra)* is officially reported at 254 F.3d 772. An earlier order of the District Court granting summary judgment (Pet. App. "B", pp. 36a-38a, *infra)* is not reported. The District Court's opinion was delivered orally, and although not reported, the transcript of the oral proceeding (Pet. App. "C", pp. 39a-61a, *infra)* is part of the appellate record.

II.

JURISDICTION

The Ninth Circuit's decision was issued on June 13, 2001. No petition for rehearing was filed. This petition is filed within ninety days of that date and invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No Constitutional provisions are implicated. This Petition directly implicates the following statutory provisions:

California Penal Code section 602 (n) provides in relevant part:

> "... [E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
>
> * * *
>
> (n) Refusing or failing to leave land, real property, or structures belonging to or lawfully occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession... or (2) the owner, the owner's agent, or the person in lawful possession ... However, this subdivision shall not be applicable to persons *engaged in lawful union activities which are permitted to be carried out on the property* by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section 1140), or *by the National Labor Relations Act* .... "
>
> (emphasis added.)

Section 157 of the NLRA, 29 U.S.C. § 157 provides:

> "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 158 (a) of the NLRA, 29 U.S.C. §158 (a), provides in relevant part:

> "(a) Unfair labor practices by employer
>
> It shall be an unfair labor practice for an employer -
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it...;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage membership in any labor organization...;

(4) to discharge or otherwise discriminate against any employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representative of his employees...."

42 U.S.C. § 1983 provides in relevant part:

"Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State... subjects, or causes to be subjected any...person.., to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...."

IV.

STATEMENT OF THE CASE

1. The Parties.

Petitioner Rainbow Construction Company ("Rainbow") is a general building contractor that worked on several public projects in Mendocino County, California during the mid-1990's. (Pet. App. A, pp. 3a-5a.)[1] The incidents forming the bases for this lawsuit occurred at two of Rainbow's job sites: the Pomolita Middle School site ("Pomolita site") and the Mendocino County Administration Center job site ("Mendocino site"). *Id.* Rainbow did not have a collective bargaining agreement with any union, nor were its employees union members. (Pet. App. A, p. 3a.)

Respondents Richard Radcliffe, Charles Taylor, Andrew Slivka, Jr., and Jay Streets are Business Agents for the Bay Counties District Council of Carpenters ("Union"). *Id.*

2. In 1995 The Union Business Agents Visited Rainbow's Job Sites Where They Were Arrested For Trespass.

On May 16, 1995, Business Agents Radcliffe, Taylor, and Streets visited the Pomolita site. (Pet. App. A, p. 6a.) Rainbow confronted the Business Agents as they entered the site and asked them where they were going. (ER: 413- 414.)

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[1] This factual summary only sets forth the facts relevant to the labor law preemption issue raised by this Petition and is distilled from the Ninth Circuit's Opinion and the Excerpt of Record filed with Ninth Circuit, hereinafter referenced as "ER".

Business Agent Radcliffe responded, "onto the job site." He did not state the purpose of his visit. (ER: 363-364.)

Rainbow then called the police who, upon arrival, asked the Business Agents what their purpose was in visiting the job site. (Pet. App. A, p. 6a.) Radcliffe responded, "lawful union business," without further elaboration. *Id.* Although the police convinced Rainbow to let the Business Agents complete their visit, the police warned the agents that if Rainbow wanted to perform a citizen's arrest in the future, the police would be obligated to carry out the arrest. *Id.*

Three days later, Business Agents Radcliffe and Streets visited the Mendocino site. (Pet. App. A, p. 7a.) Again, Rainbow confronted them as they entered the site and repeatedly asked them to state the purpose of their visit. *Id.* Radcliffe's only responses were either "I don't have to tell you" or "lawful union business." *Id.* As the Business Agents wandered through the site, Rainbow told them they were trespassing and requested that they leave. (ER: 311-312, 438.) Radcliffe responded he was "doing lawful union business and would not leave until [his] business was complete." (Pet. App. A, p. 7a.)

Rainbow called the police who arrived shortly thereafter. (Pet. App. A, p. 7a.) While waiting for the police to arrive, Rainbow's managing partner offered to take Radcliffe through the job site, if "you tell me what you're here to do." (ER: 223.) Radcliffe rejected the offer repeating he was "engaged in lawful union activity." (ER: 223-224.)

When confronted by the police, Radcliffe again refused to specify the nature of his "lawful union business"; rather, he asserted, "I believe I have a right to be here. I'm not going to leave." (ER: 226-227.) Rainbow then placed

Radcliffe under citizen's arrest for trespassing, and the police took him into custody. (Pet. App. A, p. 7a.)

With minor variations, this scenario was repeated on two more occasions resulting in Radcliffe being placed under citizen's arrest three times for trespassing and Business Agents Taylor and Slivka each being arrested once for trespassing. (Pet. App. A, pp. 7a-8a.) The Business Agents consistently refused to state the purpose of their visits other than to claim the purpose was "lawful union business" or make a general statement that they believed they had a right to be on the property. *Id.* There were no union subcontractors or union represented employees present at the construction sites on the days the arrests were made. (ER: 191-193, 307.)

3. The Business Agents Stand Trial For Criminal Trespass And Are Acquitted.

The Mendocino County District Attorney filed a criminal trespass complaint against the four Business Agents. (Pet. App. A, pp. 7a-9a.) The California trial court dismissed the criminal complaint as against Business Agent Streets because he had never been arrested for trespassing. (Pet. App. A, p. 9a.) A jury acquitted Business Agents Radcliffe, Taylor, and Slivka finding that "they had engaged in lawful union activity under the National Labor Relations Act" while on the premises. (Pet. App. A, p. 9a; Pet. App. C, p. 4la.)

4. The Business Agents File A Civil Complaint In Federal Court Asserting Various Causes Of Action, Including Claims For Violation Of 42 U.S.C. § 1983, False Arrest, False Imprisonment And Malicious Prosecution, All Of Which Are Dismissed By The District Court.

Once acquitted, the four Business Agents filed a complaint in the United States District Court for the Northern District of California. They sued Rainbow and its partners as well as the Associated Builders & Contractors, the Mendocino County District Attorney, the Ukiah Unified School District, the County of Mendocino, and two County employees on various causes of action including 42 U.S.C. §1983. (Pet. App. A, pp. 9a-10a.) In addition, the Business Agents sued Rainbow and its named partners under California law for false arrest, false imprisonment and malicious prosecution. *Id.*

The District Court granted summary judgment and dismissed all claims against all parties. (Pet. App. A, p. 10a.) With respect to the Section 1983 claim pled against Rainbow, the District Court found the Business Agents failed to produce sufficient evidence of the alleged conspiracy among the parties and thus failed to establish state action, an element necessary to maintaining a Section 1983 claim. (Pet. App. C, pp. 42a-43a.) The District Court then dismissed the tort claims on the basis that the Business Agents, as a result of the criminal trial, were collaterally estopped from relitigating the issue of whether there was probable cause for their arrests. (Pet. App.

C, pp. 44a-45a.)[2] As a result, the District Court found it unnecessary to address Rainbow's alternative argument that the tort claims were preempted by the NLRA. (Pet. App. C, p. 48a.)

5. The Ninth Circuit Reverses The District Court And Issues An Opinion Giving California The Prerogative To Define What Constitutes Protected Union Activity On An Employer's Premises.

On appeal, the Ninth Circuit fully addressed the NLRA issue as it pertained to both the Section 1983 and state tort claims. (Pet. App. A, pp. 10a-13a, 20a-26a.) With respect to the Business Agents' Section 1983 cause of action, premised on Rainbow's interference with the Business Agents "rights" under the NLRA, the Ninth Circuit easily found the claim barred based on the National Labor Relations Board's ("NLRB") primary jurisdiction:

> "... To the extent that the plaintiffs' § 1983 claim is based on an alleged violation of their rights under § 7 of the NLRA, therefore, it qualifies as an ordinary subject of unfair labor practice proceedings before the National Labor Relations Board .... Because the plaintiffs' claim could have been brought before the

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[2] The Business Agents had also sued Rainbow for intentional and negligent infliction of emotional distress and for negligence. These claims were dismissed on the basis that there was no outrageous conduct and/or for lack of damages. (Pet. App. C, pp. 45a-48a.) The Business Agents did not appeal these dismissals, and no issue is raised in this Petition with respect to these additional tort claims.

> Board as an unfair labor practice, it is not cognizable as a § 1983 claim, because 'the National Labor Relations Board... has exclusive jurisdiction to prevent and remedy unfair labor practices by employees and unions.' *Golden State [Transit Corp. v. City of Los Angeles]* 493 U.S. at 108 .... "
>
> (Pet. App. A, p. 12a.)[3]

In stark contrast, using reasoning as remarkable as the result, and describing the case as raising "exquisite" preemption questions, the Ninth Circuit held that the NLRA did not preempt the state tort claims. (Pet. App. A, p. 21 a.) As the Ninth Circuit had already acknowledged during its discussion concerning the Section 1983 claim, "the arrests and attendant imprisonment could form the basis of an unfair labor practice complaint before the NLRB." (Pet. App. A, p. 23a.) In addition, the Ninth Circuit conceded two important points: first, the state court is "likely to focus in part on whether the plaintiffs were engaged in lawful union activity protected by the NLRA..."; and second, a finding as to whether "lawful union activity" occurred might "duplicate or even contradict that [which] could be made by the Board in an unfair labor practice proceeding." (Pet. App. A, p. 24a.)

Despite these observations, the Ninth Circuit held that California's interests in protecting its citizens, providing them with monetary damages, and accommodating union activity on

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[3] The only claim that the Business Agents pursued on appeal against some of the non-Rainbow parties was the Section 1983 cause of action. On varying grounds, the Ninth Circuit affirmed the District Court's grant of summary judgment of the Section 1983 claim with respect to these non-Rainbow parties. (Pet. App. A, pp. 10a-17a.)

private property trumped preemption. (Pet. App. A, pp. 25a-26a.) In so doing, it declared the issues that could have been presented to the NLRB are not "identical" to those presented to the state court because the tort causes of action entail elements of proof (e.g. "an arrest") beyond the primary controversy of whether the business agents were engaged in activity protected by the NLRA. (Pet. App. A, p. 24a.) The Ninth Circuit further assured its readers that there is "little realistic risk of interference with the [NLRB's] primary jurisdiction..." because, in classes of cases involving trespass, California is free to devise its own rules as to what constitutes "lawful union activity" under the NLRA. (Pet. App. A, p. 25a.) The Ninth Circuit then reversed the District Court's application of the collateral estoppel doctrine to the tort claims and remanded them to the District Court for further proceedings. (Pet. App. A, pp. 26a-28a.)

V.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision not only reaches the wrong result, but more importantly, its reasoning demonstrates fundamental misunderstandings of NLRA preemption jurisprudence. As a result of this decision, California courts or juries must now interpret the NLRA as part of adjudicating the Business Agents' tort claims. *California can now find conduct protected by the NLRA even if the NLRB would find it unprotected.*

It also bears noting that just two days after issuing the instant decision, the Ninth Circuit issued an opinion in

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) *(en banc) (cert. pet. pending).*[4] Although *Cramer* concerns "Section 301" labor law preemption (29 U.S.C. § 185), it, too, finds that issues supposedly governed by uniform federal law are now controlled by state law and subject to the vagaries of a jury applying state law. Together the cases demonstrate the Ninth Circuit's disregard for applying national labor law standards.[5]

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[4] Consolidated Freightways has advised Rainbow's counsel that the company's petition for certiorari will be filed in this Court by September 13, 2001.

[5] This Petition does not raise the issue of whether California is precluded by the NLRA from granting the Union Business Agents access to private property. Rainbow acknowledges that California law determines the extent of its property interest vis-á-vis the Business Agents. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994); *Calkins d/b/a Indio Grocery Outlet*, 323 NLRB 1138 (1997) *enf'd* 187 F.3d 1080 (9th Cir. 1999) *cert. den.* 529 U.S. 1098 (2000). The issue, here, arises from California's decision to use the NLRA as a means to define whom is exempt from its trespass statute. It is the manner in which California has defined its access rights that is at issue; not California's right to grant access.

A. THE NINTH CIRCUIT DECISION DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THE NLRA PREEMPTION DOCTRINE, AS ARTICULATED BY THIS COURT IN *SAN DIEGO BUILDING TRADES COUNCIL v. GARMON*, 359 U.S. 236 (1959) AND ITS PROGENY.

1. *Garmon* Preemption Applies When A State Court Must Decide An Individual's Rights Under The NLRA In Order To Determine Whether The Controversy Presented To It Violates State Law.

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) marked this Court's determined effort to define the elusive line between controversies subject to the NLRB's primary jurisdiction and those properly left to state regulation. The rule enunciated in *Garmon*, to wit, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the states ... must defer to the exclusive competence of the National Labor Relations Board..." embodies the Court's concern that state regulation of industrial relations "would create potential frustration of national purpose." 359 U.S. at 244 - 245.

Even so, the *Garmon* Court recognized certain types of conduct "touched interests so deeply rooted in local feeling and responsibility ... we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. For the next forty-three years this Court, as well as the circuit courts, have grappled with the contours of *Garmon*, as applied to state law torts.

In *Sears Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978) this Court shifted its focus from whether certain activity was "arguably protected or prohibited" by the NLRA to whether the "controversy presented to the state court is identical to ... or different from ... that which could have been, but was not presented to the Labor Board." 436 U.S. at 197. Subsequent decisions made it clear that where the State's "focus of inquiry" was not upon the alleged unfair labor practice, *Garmon* preemption would not apply. *Compare Belknap, Inc. v. Hale,* 463 U.S. 496, 510 (1983) *with Operating Engineers v. Jones,* 460 U.S. 669, 682 (1982).

Under the modified inquiry, States can adjudicate tort claims that may have occurred during the course of a labor dispute, so long as the underlying merits of the labor dispute need not be resolved as part of the proof necessary for tort recovery. *See e.g. Belknap,* 463 U.S. at 510 (striker replacement's tort claim for misrepresentation not preempted because the State's focus of inquiry would not be upon whether the rights of the strikers themselves had been infringed); *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 293,305 (1977) (so long as the state tort is unrelated to the employment discrimination or is a function of the particularly abusive manner in which the discrimination is accomplished, state court jurisdiction will lie); *Linn v. Plant Guard Workers,* 383 U.S. 53, 64 (1966) ("The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, undercuts the ordinary arguments for preemption"). States cannot adjudicate tort claims where the claimant must prove an NLRA violation as an element of an alleged tort because the risk of interference with the national purpose is too great. *Jones,* 460 U.S. at 682 (where a fundamental part of a state cause of action requires adjudication of an element that is also crucial to proving an

unfair labor practice, both the state and federal claims are "the same in a fundamental respect").

2. The Business Agents' Tort Claims Are Preempted Because The Claims Require A Finding That The Agents Were Conducting "Lawful Union Activity" Permitted By The NLRA While On Rainbow's Premises.

Application of the foregoing principles to the tort claims raised in this case should have been straightforward. The Business Agents' claims for false arrest, false imprisonment and malicious prosecution turn on whether, at the time of their arrests, they were "engaged in lawful union activities which are permitted to be carried out...by the National Labor Relations Act...." California Penal Code § 602(n). Not only is this the precise wording *contained in the California statute,* it was the only justification given by the Business Agents for their trespass. Therefore, a state court, or jury, must determine that the Business Agents had engaged in "lawful union activity" permitted by the NLRA in order to award tort damages.

The focus of the State's inquiry will thus be identical to the focus of an NLRB inquiry: whether the Business Agents were on Rainbow's property for the purpose of conducting lawful union activity, *as defined by the NLRA. See Calkins d/b/a Indio Grocery Outlet,* 323 NLRB 1138, 1141-1142 (1997) *enf'd* 187 F.3d 1080 (9th Cir. 1999) *cert. den.* 529 U.S. 1098 (2000).[6] Pursuant to this Court's decision in *Jones,*

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[6] The Ninth Circuit cited *Calkins* in support of its admission that the Business Agents could have pursued an unfair labor practice charge against Rainbow. (Pet. App. A, p. 23a.)

the existence of such identical inquiries requires preemption. *Jones,* 460 U.S. at 682.[7]

3. These Tort Claims Cannot Be Litigated Without Intruding Upon The NLRB's Exclusive Right To Interpret And Apply The NLRA.

Garmon preemption is a prophylactic measure designed to avoid the "danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon,* 359 U.S. at 244. The Congressional power granted to the NLRB is the primary right to interpret and apply the NLRA. *Garmon* at 235 (*quoting Garner v. Teamsters Union,* 346 U.S. 485,490-91 (1953)) (Congress confided "primary interpretation and application of its rules to a specific and specially constituted tribunal...").

The Ninth Circuit's decision must not stand because it undercuts the NLRB's primary right to interpret and apply the NLRA. By the following passage, the Ninth Circuit approves the State's power to interpret the NLRA in a manner that conflicts with NLRB precedent:

> It is true that the state court is likely to be called upon to determine whether the plaintiffs were engaged in 'lawful union activity' - a finding that might duplicate or even contradict one that could be made by the Board in an unfair labor practice proceeding.

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[7] The Ninth Circuit's opinion fails to discuss, or even cite to *Jones*. Rather, it relies on *Farmer* and *Linn;* opinions that predate *Jones* by six and seventeen years respectively.

(Pet. App. A, p. 24a)

Nor is the possibility of such a conflict remote in this case. Numerous issues requiring NLRA interpretation are presented here; issues for which there is already NLRB precedent or await future NLRB adjudication, to wit:

- Whether a union official who refuses to state the purpose of his visit is engaged in "protected concerted activity". *See Villa Avila,* 253 NLRB 76, 80, 82 (1980) *enf'd as modified* 673 F.2d 281 (9th Cir. 1982) ("...it does not appear unreasonable to establish the procedure of requiring union representatives to notify the general contractor of their presence on the jobsite or perhaps even of the general locus and nature of their business... ");

- Whether an employer that forbids protected activity on its property commits an unfair labor practice. *See Calkins d/b/a Indio Grocery Outlet, supra,* (because California does not allow a shopping center to prohibit individuals from picketing on the shopping center premises, an employer who arrests union picketers for engaging in Section 7 protected activity on the shopping center premises violates the NLRA);

- Whether a union official who visits a nonunion employer's job site in order to monitor compliance with state laws when union workers are not present is engaged in "protected concerted activity". *cf. Tradesmen International,* 332 NLRB No. 107 (2000)

(union business agent who testifies before city agency that non-union construction subcontractor has not complied with city bonding ordinance is engaged in protected concerted activity); and

- Whether a union official who refuses a nonunion employer's offer to take him through the job site where no union workers are present is engaged in "protected concerted activity". *cf. Mayer Group, Inc.*, 296 NLRB 25, 27 (1989) (employer insistence that it accompany business agent on site visit unlawful notwithstanding employer's suspicion that business agent was seeking access for an improper purpose).

These issues are not of peripheral concern to the NLRA; they implicate its core provisions. Moreover, these issues will be raised by Rainbow at any tort trial if the Ninth Circuit's decision is permitted to stand. By allowing California to adjudicate such questions under the guise of litigating tort claims, the Ninth Circuit has failed to protect the NLRB's primary right to interpret the NLRA.[8]

The Ninth Circuit's willingness to tolerate conflict with the NLRB's jurisdiction is inexplicable given that it employed the proper analysis with respect to the Business Agents' 42 U.S.C. § 1983 claim. The Section 1983 claim was premised on the same controversy that underlies the tort

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[8] The Ninth Circuit even approves a case in which the California Supreme Court finds safety inspections conducted by union business agents to be lawful union activity. (Pet. App. A, p. 22a.) *(citing, In Re Catalano,* 29 Cal. 3d 1,623 P.2d 228 (1981)).

claims, yet the Ninth Circuit concluded that a federal court must yield to the NLRB. (Pet. App. A, pp. 12a-13a.) If a federal court cannot adjudicate the Business Agents' Section 1983 claim without intruding upon the NLRB's primary jurisdiction, a State court cannot adjudicate the identical controversy, re-characterized as a tort through "artful pleading". *Garmon,* 359 U.S. at 245 ("What is outside this Court's authority cannot remain within a state's power... ,).[9]

This Court has repeatedly rejected a label driven preemption test choosing instead to focus on whether "two potentially conflicting statutes were 'brought to bear on precisely the same conduct.'" *Sears,* 436 U.S. at 193-194; *see also Motor Coach Employees v. Lockridge,* 403 U.S. 274,292 (1970) ("It is the conduct being regulated, not the formal description of the governing legal standards, that is the proper focus of concern"). Because the California Legislature has written its trespass law in a manner that requires a state court to interpret the NLRA without deference to the NLRB, the "risk of interference" with the federal scheme is imminent.[10]

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[9] In this regard, NLRA *Garmon* preemption is similar to Section 301 preemption. Section 301 preemption requires a court to see whether a claim purportedly pled under state law and using state law phraseology is actually an "artfully pled" claim for breach of a collective bargaining agreement. *See* e.g., *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 219 (1985). If so, the state law claim is either treated as a claim arising under Section 301 or dismissed as preempted. *Id.* at 220.

[10] In *every* case where this Court has allowed a tort claim to be stated, it has done so based on the fact that adjudication of the tort claim neither required interpretation of the NLRA nor had a focus identical to the NLRB's focus. *See e.g., Farmer,* 430 U.S. at 305.

4. The State Interests Cited By The Ninth Circuit Are Insufficient To Overcome The Risk Of Interference With The NLRB's Primary Jurisdiction.

Because there is great risk of "interference with federal labor policy," the Ninth Circuit's finding that "[t]he state's interest in the torts [and] the potential damages.., render preemption inappropriate..." is erroneous. (Pet. App. A, p. 26a.) Even if the state court's conclusion concerning the protected nature of the Business Agents' activities mirrored that of the NLRB, California's interest in providing tort remedies to the Business Agents cannot be cited as a reason to avoid preemption:

> Since remedies form an ingredient to any integrated scheme of regulation, to allow the state to grant a remedy which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

Garmon, 359 U.S. at 247; *see also Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286-87 (1986) (statute forbidding NLRA violators from doing business with the state would interfere with "the comprehensive system established by Congress").

By allowing the cited state interests to tip the balance against preemption, the Ninth Circuit has again misapplied this Court's precedent.

B. CERTIORARI MUST BE GRANTED TO MAINTAIN THE INTEGRITY OF THE NLRB'S PRIMARY JURISDICTION.

The Ninth Circuit's decision, if allowed to stand, will significantly undermine the NLRB's jurisdiction. As already discussed, the Ninth Circuit has granted California the prerogative to define for itself what constitutes "lawful union activity" permitted by the NLRA. However, the potential applications of its written decision are more far reaching than the instant controversy.

The most obvious application of the Ninth Circuit's decision is that it denies California employers any means of accessing the NLRB's jurisdiction to determine whether a union's activity on an employers' California property is protected or prohibited under the NLRA. *See Sears,* 436 U.S. at 207. If an employer tries to enjoin a trespass, a union can cite California Penal Code § 602 (n) and have the state determine whether, in its view, the NLRA would permit such conduct. If the employer chooses to resort to self-help by arresting the union trespassers, the union is free to assert a false arrest claim where the scope of the NLRA's protections will, once again, be determined by California. Under both scenarios the employer cannot access the NLRB's jurisdiction; therefore, the employer cannot correct a state court's erroneous application of the NLRA. *Id.*[11]

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[11] In comparison, in *Sears,* this Court found that an employer's state action to enjoin trespassory conduct was not preempted, in part, because the union -- the party being sued -- had the ability to bring the dispute to the NLRB for resolution. Thus, if the union believed that the state court had enjoined *lawful activity,* the union could have the NLRB "overturn" the State's contrary determination. In this Court's words: "As long as the union has a fair opportunity to present the protection issue to the

A second application of the Ninth Circuit's decision is that it enables unions to recharacterize an unfair labor practice charge as a state tort claim. Unlike this Court's decisions in *Farmer and Linn,* where the potential for interference was acknowledged and mitigated by carefully crafted holdings, *the Ninth Circuit embraces reasoning that may lead to an actual conflict. Compare Farmer,* 430 U.S. at 305, and *Linn,* 383 U.S. at 65 *with* Pet. App. A at p. 24a. According to the Ninth Circuit, so long as the claim is framed in neutral tort language, seeks remedies unavailable from the NLRB, and concerns an area of substantial interest to the State, the claim can be pursued regardless of the extent to which its adjudication may conflict with the NLRB's jurisdiction.[12]

A third and most significant application of the Ninth Circuit's decision is that it ratifies a State's use of the NLRA as a means to define its own laws without concern as to how the NLRB interprets the NLRA. Legislators in the Ninth Circuit may now incorporate provisions of the NLRA into their own statutes as a sort of legislative shorthand and be assured that the statute will survive a *Garmon* preemption challenge.

Labor Board, it retains a meaningful protection against the risk of error in a state tribunal." *Sears,* 436 U.S. at 207.

[12] For example, an employer who engages in surveillance of lawful union activity violates the NLRA. *E.g., NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 54-55 (1937) (hiring private detectives to spy on employees unlawful); and *see Kohler Co.*, 128 NLRB 1062, 1099 (1960). However, if the surveillance takes place in a surreptitious manner, as is usually the case, the same conduct could be recharacterized as a claim for invasion of privacy. *See Hill v. NCAA*, 7 Cal. 4th 1, 35-40, 865 P. 2d 633 (1994). Indeed, *Cramer v. Consolidated Freightways, supra*, addresses the analogous issue of whether a tort claim for invasion of privacy is preempted by Section 301.

The intended, and perhaps unintended, consequences of the Ninth Circuit's decision eviscerates Congress' legislative scheme with respect to interpretation and adjudication of the NLRA. Granting certiorari is the only means by which the Ninth Circuit's faulty analysis can be examined and the primary jurisdiction of the NLRB reaffirmed.

VI.

CONCLUSION

WHEREFORE, for the aforesaid reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

Henry F. Telfeian
Counsel of Record
Law Office of Henry F. Telfeian
1247 Alvarado Road
Berkeley, CA 94705-1545

Bradford K. Newman
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
(650) 320-4787

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed June 13, 2001]
No. 99-15020

RICHARD ROBERT RADCLIFFE; CHARLES MELVIN TAYLOR; ANDREW SLIVKA, JR.; JAY STREETS,
Plaintiffs-Appellants,
v.

RAINBOW CONSTRUCTION COMPANY, a partnership; PETER A. RICHARDSON; DOUGLAS V. ANDERSON; CLIFFORD MICHAEL MCCLURE; MELON L. CHICHESTER; JAMES W. LAMBERT; CHRISTIAN HANS WEISSLEDER; UKIAH UNIFIED SCHOOL DISTRICT; JACK DANIELS, individually in his personal capacity, and as Assistant Superintendent of Schools and Consultant to the Ukiah Unified School District,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
No. CV-96-01852-CAL/MJ
Charles A. Legge, District Judge

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 13, 2001]
No. 99-17151

RICHARD ROBERT RADCLIFFE;
CHARLES MELVIN TAYLOR;
ANDREW SLIVKA, JR.;
JAY STREETS,
Plaintiffs-Appellants,
v.

RAINBOW CONSTRUCTION COMPANY, a partnership; PETER A. RICHARDSON; DOUGLAS V. ANDERSON; CLIFFORD MICHAEL MCCLURE; MELON L. CHICHESTER; JAMES W. LAMBERT; CHRISTIAN HANS WEISSLEDER; MENDOCINO COUNTY; SUSAN MASSINI, individually in her personal capacity; ALLEN F. BAZZANI, individually in his personal capacity and as Manager of Building & Grounds of the County of Mendocino; JACK DANIELS, individually in his personal

capacity, and as Assistant Superintendent of Schools and Consultant to the Ukiah Unified School District,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
No. CV-96-01852-CAL
Charles A. Legge, District Judge

OPINION

CANBY, Circuit Judge:

This appeal is an outgrowth of a dispute over the right of union representatives to visit the construction sites of a non-union general contractor in order to inspect for unsafe conditions or violations of prevailing wage policies applicable to governmental construction contracts. The plaintiffs are four representatives of the Bay Counties District Council of Carpenters ("Carpenters Union") located in Northern California. The plaintiffs entered the construction sites of the defendant, Rainbow Construction Company, and refused to depart when asked by Company officials. Rainbow's president effected citizen's arrests of three of the plaintiffs, and all four plaintiffs were subsequently prosecuted for trespass and acquitted.

The plaintiffs then brought this action against Rainbow, its president, the Mendocino County District Attorney, a local school official, and other defendants no longer in issue. The plaintiffs asserted claims for violation of

42 U.S.C. § 1983, on a theory that the private defendants had conspired with the County District Attorney to bring unfounded prosecutions in violation of the plaintiffs' rights under federal labor law and the Constitution. The plaintiffs also alleged state-law claims of false arrest, false imprisonment, and malicious prosecution.[1] The district court granted summary judgment for the defendants on all claims, and assessed sanctions of $ 75,000 against the plaintiffs' attorneys under Fed. R. Civ. P. 11. The plaintiffs appealed. We now affirm the district court's dismissal of all claims under 42 U.S.C. § 1983. We reverse the dismissal of the state-law claims of false arrest,[2] false imprisonment, and malicious prosecution against Rainbow and its president, and remand for further proceedings. We also reverse the award of Rule 11 sanctions against the plaintiffs' attorneys.

FACTUAL BACKGROUND

The facts underlying this appeal are rendered more understandable if three legal considerations are kept in mind. First, the plaintiffs in visiting construction sites were relying on *In re Catalano,* 29 Cal. 3d 1, 10, 623 P.2d 228, 234, 171 Cal. Rptr. 667 (1981), in which the Supreme Court of California held that, under a statutory exception, the general trespass statute did not apply to "lawful union activity" on the job site. Second, Rainbow and its president are private parties

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[1] The plaintiffs asserted other federal and state-law claims that were also dismissed, but the plaintiffs have abandoned those claims on appeal.

[2] Plaintiff Streets, however, was never arrested; we therefore affirm the dismissal of his state-law claim for false arrest.

who ordinarily do not act "under color of state law" within the meaning of 42 U.S.C. § 1983. The viability of the plaintiffs' § 1983 claim against the Rainbow defendants accordingly depends entirely upon proof of conspiracy or joint action between the Rainbow defendants and the District Attorney that violated the plaintiffs' federal rights. See *United Steel Workers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc). And third, the plaintiffs recognize that the Mendocino County District Attorney enjoys absolute immunity for decisions made within her prosecutorial authority, see *Imbler v. Pachtman*, 424 U.S. 409, 422-23, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976); their § 1983 claim against the District Attorney thus requires proof that she acted outside of her prosecutorial function to the injury of the plaintiffs. With these considerations in mind, we turn to the facts.

In May 1995, the plaintiffs visited two of Rainbow's job sites. One of these sites was the Pomolita Middle School; the other was the Mendocino County Administration Building. The plaintiffs assert that there were two purposes of these visits. First, the plaintiffs were seeking to enforce prevailing wage rates applicable to public construction contracts. Second, the plaintiffs were inspecting health and safety conditions as authorized by the Carpenter's Master Agreement, which they assert was applicable because Rainbow had retained at both sites the services of a union subcontractor that had signed the Carpenter Union's Agreement.[3]

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[3] At Pomolita, Rainbow had hired one man who had signed the Carpenter Union's Agreement, who worked on the site about a total of 6 days over the course of the year. At the Mendocino

The first visit occurred on May 16, 1995, and it involved no arrests. Three of the plaintiffs, Richard Radcliffe, Charles Taylor, and Jay Streets, went to the Pomolita Middle School site. Prior to their visit, the plaintiffs had been informed by defendant Jack Daniels, a school district official, that they were required to register at the school office whenever they visited a school site; the plaintiffs accordingly signed in at the Pomolita principal's office. They then proceeded to the job site, where their presence was challenged by Rainbow's president, defendant Peter Richardson. Richardson told the plaintiffs (incorrectly) that there were no union contractors scheduled to perform work on the job, and said that he was leaving to call the police.

Several minutes later, Richardson appeared with police officers, and inquired about the purpose of the plaintiffs' visit. To this inquiry, plaintiff Radcliffe responded only that he was there to conduct "lawful union business." Defendant Daniels of the School District then appeared on the site, responding to a call from Richardson, and stated that he had not given the plaintiffs permission to enter the site. Daniels volunteered to call the Superintendent in an attempt to resolve the situation, and he left to do so. By the time Daniels had returned, the plaintiffs had voluntarily left the site after the police persuaded Richardson not to effect a citizen's arrest on this occasion. The police told the plaintiffs that if Richardson wanted to make a citizen's arrest on such an occasion in the future, they would be obligated to carry out that arrest.

County Administration site, Rainbow had also hired one signatory, though he was not scheduled to report to the site for about another year at the time that the plaintiffs made their May visit.

Three days later, plaintiffs Radcliffe and Streets visited another Rainbow site, the Mendocino County Administration Center. Defendant Richardson appeared and asked them to leave. Radcliffe repeated, again without additional explanation, that he was engaged in "lawful union business" and that he would not leave until his business was completed. Richardson told them that they would be arrested if they did not leave, and Streets then left the premises. Radcliffe remained and ultimately the police arrived and took custody of him pursuant to a citizen's arrest by Richardson.[4] He was booked and promptly released without bail.

Less than two weeks later, Radcliffe and Taylor returned to the Pomolita Middle School site to conduct another, nearly identical visit. They stated only that they were on" lawful union business" and refused to leave when asked. Richardson then effected a citizen's arrest of both Radcliffe and Taylor. They were transported to the Ukiah police department, where they were booked and quickly released without bail.

The District Attorney's office subsequently declined to prosecute the trespasses leading to the two arrests, because the two Assistant District Attorneys who had examined the case concluded that the plaintiffs' conduct was not unlawful.

On September 11, 1995, plaintiffs Radcliffe and Andrew Slivka visited Rainbow's Construction site at the

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[4] During the interval before the police arrived, the site gates were locked after Radcliffe was offered the opportunity to leave, which he declined.

Mendocino County Administration Building, apparently to monitor Rainbow for potential violations of the state prevailing wage laws. After checking in at the Administration Building, Radcliffe and Slivka entered the job site. When challenged, Radcliffe stated that he was "engaged in lawful union activities." Richardson arrived and told Radcliffe, "If you'd just tell us what you want, I'll take you through and let you do it. "Radcliffe simply repeated that he was on "lawful union business"; both Radcliffe and Slivka refused to leave, and Richardson placed them under citizen's arrest. A county police officer caused them to be jailed for a short time when he learned of the prior arrests.

Following the third arrest, Richardson went to the County District Attorney's Office to seek reconsideration of the District Attorney's decision not to prosecute the May arrests. When Richardson arrived, the Assistant District Attorney who had been in charge of the case was unavailable. Richardson demanded to speak to someone about the matter. At that point, District Attorney Susan Massini came out of her office, introduced herself, and asked if she could help him. Richardson explained that the Radcliffe case had been rejected for prosecution twice before, but that the same conduct was continuing. She told him that she did not know anything about the case, but would retrieve the file from the police department, and make a determination about the prosecution.

Thereafter, Massini decided to charge the plaintiffs with all three instances of criminal trespass. In doing so, she acted rather unusually, doing no legal research to ascertain whether the plaintiffs had a right to be on Rainbow premises, for example. Nor did Massini, before moving ahead with the

prosecution, discuss the case with the two attorneys who had declined to prosecute the earlier alleged trespasses.

On April 8, 1996, the trespass trial commenced. At the close of the case against the plaintiffs, the plaintiffs moved for judgment of acquittal. The court granted Streets' motion because Streets had departed when requested and had never been arrested, but the court denied the motions as to the three remaining plaintiffs. The jury subsequently acquitted all three.

The plaintiffs then initiated this action in the federal district court, naming Rainbow Construction Company and its partners as defendants. The complaint also named as defendants Massini and Daniels, along with others who are no longer parties or in issue in this suit. The plaintiffs alleged that the defendants had violated 42 U.S.C. § 1983[5] by conspiring to deny the plaintiffs access to public works construction job sites, in violation of rights "to engage in ... concerted activities" guaranteed to them by § 7 of the

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[5] 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

National Labor Relations Act. 29 U.S.C. § 157. The plaintiffs also alleged various state law tort claims against Rainbow, Massini, Daniels, and others who are no longer parties.

After two years of discovery, the district court awarded the defendants summary judgment with respect to all claims. It also concluded that the plaintiffs had failed to present any evidence to support their allegation of a pre-arrest conspiracy between the Rainbow defendants and District Attorney Massini; for that reason, it awarded sanctions of $ 75,000 against the plaintiffs' attorneys under Fed. R. Civ. P. 11. We now affirm the district court's award of summary judgment on all of the § 1983 claims, as well as on some of the state-law claims. We reverse, however, the dismissal of the state-law claims for false arrest (with the exception of the false arrest claim of plaintiff Streets), false imprisonment, and malicious prosecution against the Rainbow defendants. We also reverse the award of sanctions against the plaintiffs' attorneys.

DISCUSSION

1. *Claims Under 42 U.S.C. § 1983.*

Before reaching the merits of the plaintiffs' claims under § 1983, we must consider a threshold issue that the district court did not address: whether the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, precludes any or all of the plaintiffs' § 1983 claims.

A. *Cognizability of 42 U.S.C. § 1983 Claims.*

(i). *Violation of rights under the NLRA*

Section 1983 provides a remedy for violation of a federal right, whether founded in the Constitution or federal statute, unless Congress forecloses that remedy "by providing a 'comprehensive enforcement mechanism for protection of [that] federal right. '" *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 106, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989) ("*Golden State II*") (quoting *Smith v. Robinson*, 468 U.S. 992, 1003, 82 L. Ed. 2d 746, 104 S. Ct. 3457 (1984)).[6] Because the plaintiffs base their § 1983 claim primarily on the violation of their federal right of concerted action under § 7 of the NLRA, Rainbow argues that the NLRA enforcement scheme precludes a remedy under § 1983. This argument is clearly insufficient when applied to the governmental defendants. As *Golden State II* itself makes clear, Congress in the NLRA has provided "no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy. " 493 U.S. at 108-09. It follows, therefore, that the § 1983 claims against the public defendants are not precluded.

The § 1983 claim against the Rainbow defendants is a different matter. An employer's interference with the right of

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[6] Rainbow improperly labels this doctrine as one of Garmon preemption. *See San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). Garmon preemption, however, refers to the preemption of state law by the NLRA. The question whether a federal remedy under § 1983 is precluded by another federal statute is governed by the doctrine of *Golden State II, not Garmon. See Smith v. Nat'l Steel & Shipbuilding Co.,* 125 F.3d 751, 756 (9th Cir. 1997).

employees under § 7 of the NLRA is an unfair labor practice. 29 U.S.C. § 158(a)(1). To the extent that the plaintiffs' § 1983 claim is based on an alleged violation of their rights under § 7 of the NLRA, therefore, it qualifies as an ordinary subject of unfair labor practice proceedings before the National Labor Relations Board. In *NLRB v. Calkins,* 187 F.3d 1080 (9th Cir. 1999), for example, we granted enforcement of a Board order against an employer for effecting a citizen's arrest of nonemployee union representatives handbilling on private property to which state law guaranteed access. Because the plaintiffs' claim could have been brought before the Board as an unfair labor practice, it is not cognizable as a § 1983 claim, because "the National Labor Relations Board ... has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions." *Golden State II,* 493 U.S. at 108; see also *Hobbs v. Hawkins,* 968 F.2d 471, 478-79 (5th Cir. 1992) (dismissing a § 1983 action brought against a private employer by a union member when the union member could have presented the claim to the NLRB as an unfair labor practice).[7]

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[7] The plaintiffs argue that the federal court can offer a § 1983 remedy in these situations because of the collateral issue exception. *See Connell Constr. Co. v. Plumbers & Steamfitters,* 421 U.S. 616, 626, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975). This exception to *Garmon* preemption provides that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies. *See id.* The collateral issue exception is, however, of no help to the plaintiffs here because their § 1983 claim is not independent of their claim under § 7 of the NLRA.

Our conclusion is not altered by the fact that the plaintiffs alleged that the Rainbow defendants conspired with state actors to violate their rights under § 7 of the NLRA. There is nothing about the presence of other actors that would defeat the jurisdiction of the NLRB over Rainbow as an employer which interfered with the plaintiffs' § 7 rights. An employer's interference with § 7 rights will often be effectuated with the aid of state actors. *See, e.g., Calkins,* 187 F.3d at 1084. It would frustrate Congress's comprehensive enforcement scheme in the NLRA to permit an employer's unfair labor practice to be adjudicated in federal court, rather than before the NLRB, simply because of an allegation that the employer conspired with state actors. The claimed violation of right is still interference by an employer with § 7 rights--an unfair labor practice within the exclusive jurisdiction of the NLRB. *See Hobbs v. Hawkins,* 968 F.2d at 475-79.

(ii). *Violation of constitutional rights*

The NLRA does not provide, of course, a comprehensive scheme for the vindication of the plaintiffs' constitutional rights. There is accordingly no preemption of the plaintiffs' § 1983 constitutional claims against the Rainbow defendants. *See*, e.g., *Phelps Dodge,* 865 F.2d at 1540*; see also Hobbs v. Hawkins,* 968 F.2d at 480. Even more clearly, there is no pre-emption of the plaintiffs § 1983 constitutional claims against the public defendants.

The plaintiffs, however, have given virtually no attention on appeal to their allegation that their constitutional rights were violated by either Rainbow or the public defendants. By concentrating almost exclusively on the

alleged violation of their rights under the NLRA, the plaintiffs have come perilously close to waiving all of their constitutional claims. Construing their briefs most favorably, we conclude that their claims of false arrest and false imprisonment without probable cause may be viewed as asserting violations of the Fourth Amendment.[8]

B. *Merits of the Cognizable § 1983 claims.*

(i) *Massini*

The primary § 1983 claim against Massini is that she conspired to prosecute the plaintiffs with the intent and purpose of depriving them of their rights under the NLRA. Massini is absolutely immune, however, from liability arising from her decision to prosecute. *See Imbler v. Pachtman,* 424 U.S. at 423-26.

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[8] The plaintiffs have failed to raise a constitutional issue regarding their claim of malicious prosecution. The only reference to the Constitution in that connection was a comment at the end of one sentence that their arrests and prosecution in violation of the NLRA and state law also were "so blatantly lacking in legal justification as to render them a violation of the plaintiffs' constitutional due process rights as well." No further elaboration or argument is offered in support of this bare statement, and we accordingly deem the constitutional argument waived. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n.18 (9th Cir. 2000) (an appellant waives a contention by failing to support it by argument). In any event, the § 1983 claim based on malicious prosecution suffers from the same defects as the constitutionally-based false arrest and false imprisonment claims, discussed in the text that follows.

The plaintiffs concede that most of Ms. Massini's conduct was absolutely immune, but maintain that some of her conduct fell outside of the scope of her prosecutorial role. With one possible exception, we find no merit in that argument. Massini did not exceed her prosecutorial role by sending plaintiff Streets a letter informing him that he had been charged with trespass, and directing him to present himself at the police station for arrest and booking under the threat of a bench warrant. A prosecutor's activities in connection with the preparation and filing of charging documents, including a motion for an arrest warrant, are protected by prosecutorial immunity. *See Kalina v. Fletcher,* 522 U.S. 118, 129, 139 L. Ed. 2d 471, 118 S. Ct. 502 (1997). The letter to Streets was necessarily incidental to those duties.

The plaintiffs also contend that Massini acted beyond the scope of her prosecutorial powers when, in 1996, she saw Radcliffe glaring at her from a street corner near the courthouse, and she asked the police to question him because she thought he might be carrying a bomb. The police questioned Radcliffe on the street. Assuming that such conduct exceeded the scope of Massini's prosecutorial role, we find nothing in the record from which a reasonable trier of fact could find that Massini's request to the police violated Radcliffe's rights under the Fourth Amendment or the NLRA.

As will be more fully explained in the discussion of the claims against the Rainbow defendants, Massini had nothing to do with the arrest and detention of the plaintiffs. There is no evidence to support a claim of constitutional violation by her in that connection. Summary judgment in her favor was accordingly required.

(ii) *Daniels*

The evidence that Daniels conspired to violate the plaintiffs' §7 rights was wholly insufficient to forestall summary judgment. The plaintiffs were required to produce "concrete evidence" of an agreement or "meeting of the minds" between Daniels and others to violate the plaintiff's rights. *See Phelps Dodge,* 865 F.2d at 1540-41, 1543. This the plaintiffs have not done.

Daniels sent a letter to Radcliffe stating that School District policy required school visitors to register at the school office and requesting Radcliffe to follow this rule in the future when visiting any of the school district sites. The plaintiffs argue that this letter raises an inference of conspiracy because it arrived one week after Richardson wrote the plaintiffs a letter threatening them with arrest for coming on to Rainbow sites. The plaintiffs contend that Daniels' letter gave them permission to enter school sites; they see further evidence of conspiracy in the fact that Daniels, when he was called to the job site by Richardson and asked by police whether he had given permission, denied that he had done so. (Daniels then volunteered to call the Superintendent in an attempt to resolve the situation.) Finally, argue the plaintiffs, Daniels wrote a report of the incident.[9]

This evidence is wholly insufficient to present a jury question on the existence of a conspiracy to violate the

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[9] The plaintiffs also point to a few other pieces of evidence that do not merit discussion.

plaintiffs' constitutional rights. The plaintiffs bore the burden of persuasion on the conspiracy issue, and Daniels has pointed to a number of shortfalls in the plaintiffs' conspiracy allegations. *See Phelps Dodge,* 865 F.2d at 1543. For example, the plaintiffs have adduced no evidence tying Daniels to the arrests effected by Rainbow. Indeed, the plaintiffs have not produced a shred of evidence to show that Daniels was even *aware* of the arrests at the time that they took place. Nor have the plaintiffs adduced any evidence demonstrating that Daniels somehow ratified these arrests. The district court accordingly did not err in concluding that the plaintiffs had failed to raise a triable issue of conspiracy on the part of Daniels. The summary judgment in his favor on the § 1983 claim is affirmed.

(iii) *The Rainbow Defendants*

The Rainbow defendants are not state actors. Because § 1983 creates liability for deprivations of federal rights "under color of state law," the Rainbow defendants cannot be liable unless they conspired or acted jointly with state actors to deprive the plaintiffs of their constitutional rights. *See Phelps Dodge,* 865 F.2d at 1540.

As we have already pointed out, there is insufficient evidence to raise a triable issue that Daniels conspired with the Rainbow defendants. The constitutional claims against Rainbow therefore depend on evidence that the Rainbow defendants conspired with Massini to violate the plaintiffs' Fourth Amendment rights. That evidence is lacking.

The theory on which the plaintiffs pleaded and originally presented their case to the district court was that

Richardson or other Rainbow agents conspired with Massini *prior to* the arrests. No evidence was offered to support this theory and it is quite inconsistent with the failure of the District Attorney's office to prosecute the first two charges. Indeed, the utter failure to support the allegation of a pre-arrest conspiracy led the district court to sanction the plaintiffs' attorneys under Fed. R. Civ. P. 11.[10]

The only direct evidence of any contact between the Rainbow defendants and Massini occurred *after* the third arrest, when Richardson went to the District Attorney's office to inquire why the earlier arrests had not led to prosecutions. When an assistant who had handled one of the earlier cases proved unavailable, Richardson insisted on talking to someone. Massini then introduced herself and asked if she could help. Richardson said that the earlier two arrests had not been prosecuted, but that the conduct was continuing and there had been another arrest. Massini said that she knew nothing about the matter, but would look into it. That is the entire encounter, according to the uncontradicted evidence of Massini and Richardson. This unremarkable exchange between a complaining citizen and a prosecutor does not amount to a conspiracy to deprive the plaintiffs of their Fourth Amendment rights.

The plaintiffs point to Massini's subsequent zeal in prosecuting, and her lack of research or discussion with her deputies who had dealt with the earlier cases, as evidence of

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[10] This sanction is the subject of the consolidated appeal, and is addressed later in this opinion.

conspiracy. The plaintiffs also suggest that one motive of Massini was to curry Richardson's support for Massini's upcoming re-election bid. But zealous prosecution, even careless or improperly motivated prosecution, is not sufficient to raise a triable issue of conspiracy with the citizen complainant. A relationship of cause and effect between the complaint and the prosecution is not sufficient, or every citizen who complained to a prosecutor would find himself in a conspiracy. The plaintiffs must provide evidence of "an agreement or meeting of the minds to violate constitutional rights." *Id.* at 1540-41 (internal quotation marks omitted). Here, there was insufficient evidence to raise a triable issue of such an agreement.

The plaintiffs rely on *Phelps Dodge*, but that case is easily distinguishable on its facts. In that case, we held that the plaintiff union and strikers had presented a triable issue of conspiracy by a great deal of evidence, including: (1) the fact that many of the law enforcement officials who had broken up the strike held positions with Phelps Dodge; (2) Phelps Dodge managers had met with the sheriff to discuss the upcoming arrests; a Phelps Dodge representative stated that he hoped that bail would be set high because he "wanted those people off the streets," *id.* at 1544; the sheriff said that he planned to ask for $ 15,000 bail for each striker; the sheriff and the Phelps Dodge representatives then together went over a list of the persons to be arrested; (3) the justice of the peace, who was a Phelps Dodge employee, then issued warrants without probable cause and set bail at $ 15,000 for each striker without inquiring into any facts concerning the appropriateness of bail; and (4) there were regular meetings and a high degree of cooperation between Phelps Dodge representatives and law enforcement personnel throughout the

strike; Phelps Dodge security personnel issued instructions to sheriff's deputies concerning treatment of picketers and strikebreakers.

Nothing approaching this evidence of agreement and concerted action was presented in the case before us. Moreover, the alleged interference with the plaintiffs' Fourth Amendment rights arose from arrests that were perfected before anyone from Rainbow had met with Massini. In light of the absence of any probative evidence of agreement or concerted action which might lend "color of state law" to Rainbow's actions, the district court properly awarded summary judgment for the Rainbow defendants on all of the § 1983 claims.

2. *State Tort Claims*.

A. *Preemption*.

A threshold issue is also presented with regard to the plaintiffs' state-law tort claims of false arrest, false imprisonment, and malicious prosecution. Rainbow argues that all of these claims are preempted under the doctrine of *San Diego Building Trades Council v. Garmon,* 359 U.S. at 245. *Garmon* held that state "causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the [NLRA]." *Belknap v. Hale,* 463 U.S. 491, 498, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983) (citing *Garmon,* 359 U.S. at 245).

Garmon's possible application to this case raises some exquisite questions. The general rule is that § 7 of the NLRA

protects concerted activity, but it does not confer on non-employees the right to conduct that activity on the employer's property, unless there is no other means of reaching the employees. *See Lechmere, Inc. v. NLRB,* 502 U.S. 527, 538, 117 L. Ed. 2d 79, 112 S. Ct. 841 (1992). Thus, when a union's picketing activities trespass on an employer's property, the employer ordinarily may maintain a trespass action against the union; the trespass claim is not preempted even though the union's picketing was arguably prohibited or protected by federal law. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters,* 436 U.S. 180, 207, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978). The property right underlying the law of trespass, of course, is a matter of state law.

We conclude that the state-law torts of false arrest, false imprisonment, and malicious prosecution arising out of such a trespass arrest are similarly not preempted by the NLRA. Freedom of citizens from false arrest, false imprisonment, and malicious prosecution "touch[] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act." *Garmon,* 359 U.S. at 243-44. Thus false arrest, false imprisonment, and malicious prosecution are similar to torts of threatened violence, traditionally held not to be preempted, *see Automobile Workers v. Russell*, 356 U.S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932 (1958), or intentional infliction of emotional distress, and defamation, both of which the Supreme Court has held to be excepted from *Garmon's* pre-emption rule even though they involve conduct arguably protected or prohibited by the NLRA. *See Farmer v. United Brotherhood of Carpenters, Local 25*, 430 U.S. 290, 51 L.

Ed. 2d 338, 97 S. Ct. 1056 (1977) (intentional infliction); *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 15 L. Ed. 2d 582, 86 S. Ct. 657 (1966) (defamation).

Rainbow contends, however, that a peculiar twist in the California trespass law renders preemption appropriate in this case. The State's trespass law makes it a misdemeanor to refuse to leave property when asked by the owner, but it encompasses an exception for "persons engaged in lawful labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act ... or by the National Labor Relations Act. "Cal. Penal Code § 602(n). Thus, safety inspections by union representatives at worksites cannot be criminally prosecuted as trespasses. *Catalano,* 29 Cal. 3d at 4. California's question of state law thus includes a reference to federal law.[11]

The result of this reference in this case, Rainbow argues, is that the validity of the plaintiffs' claims of false arrest, false imprisonment, and malicious prosecution largely turns on whether the union activities carried on by the plaintiffs were, apart from their location, protected by § 7 of the NLRA. Rainbow argues that the three claims therefore lie properly within the exclusive jurisdiction of the NLRB. We

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[11] It is true that *Catalano* did not focus on federal law in determining that customary union activity was excepted from the criminal trespass statute, but the California Supreme Court also made it clear that, under § 602(n), "union activity protected by state or federal labor law clearly does not violate" the criminal trespass statute. *Catalano,* 29 Cal. 3d at 13-14 (internal quotation marks omitted).

agree that the arrests and attendant imprisonment of the plaintiffs could form the basis of an unfair labor practice complaint before the NLRB. Indeed, in *NLRB v. Calkins,* 187 F.3d at 1085-86, we upheld an NLRB ruling that an employer committed an unfair labor practice by effecting a citizen's arrest of non-employee union handbillers on the employer's property to which state law guaranteed access.

The fact that a state tort may also constitute an unfair labor practice, however, does not inevitably cause preemption of the state claim. In *Farmer*, for example, the Supreme Court held that state tort claims were not preempted even though the plaintiff could have asserted some of them as unfair labor practice charges. *See Farmer,* 430 U.S. at 303-04. The Court held that "the potential for interference [with the federal labor scheme] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304. Similarly, the Supreme Court held a state defamation claim not to be preempted even though the defamatory statements might also constitute an unfair labor practice. *See Linn,* 383 U.S. at 63.

One consideration leading the Supreme Court to find no preemption in these cases is that the state court deciding the tort claim would focus on different issues from those central to the unfair labor practice claim. Thus defamatory speech might be an unfair labor practice, but the NLRB would focus on the coercive effect of that speech on a representation election, and would not be concerned with its defamatory character. *See id.* Indeed, the Court has stated the test of preemption in such circumstances as follows:

> [A] critical inquiry in applying the Garmon rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is *whether the controversy presented to the state court is identical with that which could be presented to the Board.*

Belknap, Inc. v. Hale, 463 U.S. at 510 (emphasis added). Here, this test is not met. The state court must decide whether the plaintiffs were in fact falsely arrested, imprisoned, and maliciously prosecuted. It is true that, in deciding that question, the state court is likely to focus in part on whether the plaintiffs were engaged in lawful union activity protected by the NLRA, but it will also focus on state concerns of accommodating such union activity with the state-law rights of private property--an accommodation that has led California to limit the employer's property rights well beyond the degree required by federal law under *Lechmere,* 502 U.S. at 538. *See Catalano,* 29 Cal. 3d at 14-17. Were the Board, on the other hand, to consider an unfair labor practice charge arising from the same conduct, it would focus on whether the employer had interfered with the plaintiffs' § 7 rights, regardless of whether there had been an arrest, imprisonment or prosecution. The issues before the state court and the Board would not be identical.

It is true that the state court is likely to be called upon to determine whether the plaintiffs were engaged in" lawful union activity"--a finding that might duplicate or even contradict one that could be made by the Board in an unfair labor practice proceeding. We also recognize that the plaintiffs

here, unlike the employer in *Sears*, have the right to file an unfair labor practice charge with the Board. These factors, considered alone, would militate in favor of preemption. *See Sears,* 436 U.S. at 202. But there is little" realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices," *id.* at 198, because the Board ordinarily leaves to the State the question whether non-employee union activity may be conducted on the employer's property. *See Lechmere* 502 U.S. at 538. In the present case, for example, the state law claims may turn substantially on the question whether a union representative, to avoid arrest for trespass, must specify to the employer what union activity is proposed on the employer's property--a question that the State is free to determine just as it is free to exclude most protected activity entirely from the employer's property under *Lechmere*.

The State also has a substantial interest in protecting its citizens from false arrest, false imprisonment, and malicious prosecution. *See Linn,* 383 U.S. at 61-62 (state interest in protecting citizens from defamation justifies exemption from *Garmon* preemption). False arrest, false imprisonment, and malicious prosecution may cause substantial damages, and even lead to punitive damages, neither of which the Board could award to the plaintiffs in an unfair labor practice proceeding. *See id.* at 63-64. The fact that damages may not have been substantial in this particular case does not favor preemption; we must determine exceptions from *Garmon* preemption for "appropriate *classes* of cases." *Farmer,* 430 U.S. at 296 (emphasis added).

> "(W)e (cannot) proceed on a case-by-case basis to determine whether each particular final

> judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard."

Id. at 296 n.7 (quoting *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 289-90, 29 L. Ed. 2d 473, 91 S. Ct. 1909 (1971)). Similarly, it is not practical here to make preemption depend on the degree of damages that may follow from particular false arrests, false imprisonments, or malicious prosecutions. The State's interest in the torts, the potential damages, and the lack of interference with federal labor policy render preemption inappropriate in this class of cases arising from alleged trespasses on an employer's property. We accordingly reject Rainbow's preemption contentions.

B. *Merits of the State Law Claims Against the Rainbow Defendants.*[12]

The false arrest claim of plaintiff Streets against the Rainbow defendants fails because there is no evidence that Rainbow effected an arrest of Streets. The remainder of the

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[12] The plaintiffs have not pursued on appeal their state-law claims against the public defendants.

false arrest claims, and the false imprisonment[13] and malicious prosecution claims, were rejected by the district court on the ground of collateral estoppel; the district court held that the state court's denial of a directed verdict in the criminal trial adjudicated the issue of probable cause adversely to the plaintiffs.

The plaintiffs concede that lack of probable cause is an element of false arrest[14] and malicious prosecution but argue that probable cause was not adjudicated when the state court denied the plaintiffs' motion for a directed verdict in the criminal trial. We need not decide that question, however, because collateral estoppel does not apply when the ruling in issue was not subject to appeal. *See Anderson-Cottonwood Disposal Serv. v. Workers' Comp. Appeals Bd.*, 135 Cal. App. 3d 326, 332, 185 Cal. Rptr. 336 (1982); *see also Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983). In this case, the plaintiffs could not have appealed the denial of their motion to acquit because the interlocutory order could not be appealed, *see People v. Rocovich*, 269 Cal. App. 2d 489, 490, 74 Cal. Rptr. 755 (1969), and the subsequent acquittal by the jury precluded the plaintiffs from raising the issue in an appeal from the final judgment. *See Anderson-Cottonwood*, 135 Cal. App. 3d at 332-33 (plaintiffs not collaterally estopped because, as prevailing parties in prior litigation, they could not secure appellate review of ruling).

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[13] The district court did not discuss the false imprisonment claim separately, but appears to have lumped it with the false arrest claims.

[14] *But see Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 591 & n.4, 156 Cal. Rptr. 198, 595 P.2d 975 (1979).

The cases relied on by the Rainbow defendants are not in point: in *People v. Trevino,* 39 Cal. 3d 667, 695-96, 217 Cal. Rptr. 652, 704 P.2d 719 (1985), the prosecution appealed and the defendant was allowed to support the judgment by urging error in denying the motion for acquittal; in *People v. Smith,* 64 Cal. App. 4th 1458, 1464 (1998), the defendant was convicted and was able to argue improper denial of a motion for acquittal as part of his appeal from a final judgment.

The district court accordingly erred in holding that the plaintiffs were collaterally estopped from pursuing their false arrest claims and malicious prosecution claims against the Rainbow defendants. The district court also dismissed the false imprisonment claim (asserted only by plaintiff Radcliffe) without discussion, apparently grouping it with the false arrest claims. The plaintiffs assert that probable cause is not an element of a false imprisonment claim. *See Collins v. Owens,* 77 Cal. App. 2d 713, 716, 176 P.2d 372 (1947). We need not address that issue, because we are reversing the district court's ruling that the plaintiffs were estopped to deny probable cause. We reverse the dismissal of the false imprisonment claim along with the dismissal of the false arrest claims. We remand the false arrest claims (other than Streets', which we have affirmed), the false imprisonment claim, and the malicious prosecution claims to the district court for further proceedings. Our reversal is based solely on the error in applying collateral estoppel; we express no opinion regarding the merits of those claims, nor regarding their appropriateness for determination upon a renewed motion for summary judgment.

RULE 11 SANCTION

The final issue we must address involves the district court's award of Rule 11 sanctions against the plaintiffs' attorneys. The district court awarded the defendants $ 75,000 after the defendants moved for sanctions under Fed R. Civ. P. 11(c)(1)(A).[15] The district court concluded that the sanctions were appropriate in light of its finding that the plaintiffs, in alleging a conspiracy between Rainbow and the County District Attorney's Office, had failed to identify allegations that were "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. "Fed. R. Civ. P. 11(b)(3). Without passing judgment on the correctness of this finding, we conclude that the district court abused its discretion in granting an award of sanctions.[16]

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[15] Fed. R. Civ. P. 11(c)(1)(A) provides:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

[16] We review the award of Rule 11 sanctions under the abuse of discretion standard. *See Barber v. Miller*, 146 F.3d 707, 709 (9th Cir. 1998).

Rule 11(c)(1)(A) provides strict procedural requirements for parties to follow when they move for sanctions under Rule 11. To comply with the Rule, Rainbow Construction was required to serve its Rule 11 motion on the plaintiffs with a demand for retraction of the allegedly offending allegations, and then to allow the plaintiffs at least twenty-one days to retract the pleading before filing the motion with the court. *See* Fed. R. Civ. P. 11(c)(1)(A). Rainbow did not follow this procedure. Rainbow filed its Rule 11 motion along with a motion for summary judgment with the court on August 18, 1998. Rainbow did not serve the plaintiffs with the motion in advance of filing and thus did not comply with the twenty-one day advance service provision. Having not followed this procedure, Rainbow was not entitled to obtain an award from the plaintiffs.

The district court concluded that, even though the defendants did not give twenty-one day advance service to the plaintiffs, a "literal application of the safe harbor provision" was unnecessary in this case. The court decided that because Rainbow had filed a Rule 11 motion in response to the plaintiff's first amended complaint, and three months had passed between the motion and the court's order concerning sanctions, the plaintiffs and their attorneys had been given adequate notice and opportunity to withdraw the challenged allegation. As a result, the court ruled that Rule 11(c)(1)(A)'s "safe harbor" provision had been satisfied, notwithstanding the lack of advance service on the plaintiffs.

This view failed to take proper account of our decision in *Barber v. Miller,* 146 F.3d 707 (9th Cir. 1998). In *Barber*, we held that the procedural requirements of Rule 11(c)(1)(A)'s "safe harbor" are mandatory. *Id.* at 710-11. Thus, in *Barber*,

we concluded that, although a defendant had given informal warnings to the plaintiffs threatening to seek Rule 11 sanctions, these warnings did not satisfy the strict requirement that a motion be served on the opposing party twenty-one days prior to filing. *Id.* at 710. It is the service of the motion that gives notice to a party and its attorneys that they must retract or risk sanctions. In light of our holding in *Barber*, the fact that the plaintiffs had advance warning that Rainbow objected to their conspiracy allegation did not cure Rainbow's failure to comply with the strict procedural requirement of Rule 11(c)(1)(A). The district court abused its discretion when it concluded otherwise.

We reject Rainbow's argument that the district court's order for sanctions can be interpreted as a Rule 11 motion on the court's own initiative, pursuant to Fed. R. Civ. P. 11(c)(1)(B). This provision does not require twenty-day advance notice. Fed. R. Civ. P. 11(c)(1)(B). We reject Rainbow's contention because it was Rainbow, not the court, that initiated the award of sanctions. The district court's discussion of the safe harbor provision in its order concerning sanctions serves to emphasize this point. It would render Rule 11(c)(1)(A) 's "safe harbor" provision meaningless to permit a party's noncompliant motion to be converted automatically into a court-initiated motion, thereby escaping the service requirement.

Because Rainbow did not follow the mandatory service procedure of Rule 11(c)(1)(A), we reverse the award of sanctions.

CONCLUSION

We affirm the district court's dismissal of all of the plaintiffs' § 1983 claims. We reverse the dismissal of the false

arrest claims of all of the plaintiffs except Streets against the Rainbow defendants; we also reverse the dismissal of the false imprisonment claim and the malicious prosecution claims against the Rainbow defendants; we remand these matters to the district court for further proceedings. We affirm the dismissal of all of the plaintiffs' remaining claims.

We reverse the award of Rule 11 sanctions against the plaintiffs' attorneys.

Massini and Daniels are entitled to their costs on appeal. The remaining parties will bear their own costs for the consolidated appeals.[17]

No. 99-15020 AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

No. 99-17151 REVERSED.

DISSENT

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[17] The motion of the plaintiffs to file an oversized opposition to Rainbow's motion for sanctions is granted, and the opposition is ordered filed. The motions of the plaintiffs and of the Rainbow defendants for damages, sanctions, and double costs on appeal are denied. The motion of the plaintiffs to strike portions of Rainbow's supplemental excerpts of record is granted in part and denied in part; the court has disregarded portions of the excerpts that were not before the district court. The motion of the Asian Law Caucus and National Employment Lawyers Association for leave to file a brief amicus curiae is granted, and the brief is ordered filed.

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I fully agree with Judge Canby's analysis as to all defendants and causes of action save the § 1983 claim against Richardson. I would hold that the plaintiffs have presented sufficient evidence to raise a triable issue of fact as to whether Richardson and Massini formed an agreement at their meeting in September 1995 to deprive the union officials of their constitutional rights by prosecuting them without probable cause.[1]

To establish a conspiracy, a plaintiff must demonstrate the existence of "an agreement or meeting of the minds" to violate the plaintiffs' civil rights. *United Steel Workers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989) (en banc). We have recognized that "direct evidence of improper motive or an agreement among the parties to violate a plaintiff's constitutional rights will only rarely be available." *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1302 (9th Cir. 1999). It will therefore almost always be necessary to infer such agreements from circumstantial evidence such as the actions of the defendants. *Id.* For example, a showing that the alleged conspirators have committed acts that are "unlikely to have been undertaken without an agreement" may allow a jury to infer the existence

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[1] I do not agree with the majority's conclusion that the plaintiffs have failed adequately to raise a constitutional issue regarding their claim of malicious prosecution. I do, however, agree that the plaintiffs have failed to present any evidence that Massini conspired with any of the Rainbow defendants *before* the arrests.

of a conspiracy. *Id.* at 1301 (citing *Kunik v. Racine County,* 946 F.2d 1574, 1580 (7th Cir. 1991)). The possibility that other inferences could be drawn that would provide an alternate explanation for the defendants' actions does not entitle them to summary judgment. 192 F.3d at 1303 (citing *Phelps Dodge,* 865 F.2d at 1542 (inference need not be most likely but merely a "rational" or "reasonable" one)). Moreover, we have held that "whether defendants were involved in an unlawful conspiracy is generally a factual issue and should be resolved by the jury, so long as there is a possibility that the jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." 192 F.3d at 1301 (quotations omitted).

I believe that District Attorney Massini's most unusual actions in prosecuting this trespass case permit the inference of a conspiracy between Massini and Richardson to deprive the defendants of their civil rights. Although neither the Assistant District Attorney nor the Deputy District Attorney could remember another case in which Massini overruled their decision on a misdemeanor filing, she countermanded the determination of her subordinates that prosecution in this case was not warranted because the union officials' conduct was not unlawful. She did no legal research and did not discuss the case with the two charging district attorneys before deciding to prosecute, and alleges that she has never read *In re Catalano*, the leading case governing the exception from the trespass statute for lawful union activity. Moreover, although it was the practice for the charging deputy district attorney to sign criminal complaints, Massini personally signed the complaints against the plaintiffs and directed that "no deals" with the defense be offered or accepted in the case. While there may be

other, more likely explanations for Massini's actions, I believe that the plaintiffs have presented sufficient evidence to defeat summary judgment by showing that one possible inference a reasonable jury might draw from her conduct is that she formed an agreement in her meeting with Richardson to deprive the plaintiffs of their civil rights. *See Phelps Dodge,* 865 F.2d at 1542.

The majority opinion raises the specter of finding a conspiracy every time a citizen's complaint to a prosecutor results in a prosecution. However, the district attorney's actions in this case were highly unusual; so unusual, in fact, that it provoked a grand jury investigation that ultimately resulted in a report censuring Massini for her "lack of research" and "questionable decision to proceed with prosecution." Surely district attorneys can and have conspired with employers or others to suppress the rights of individuals. To find evidence of such a conspiracy in one extreme case would not intimidate district attorneys, frustrate the goals of law enforcement, interfere with employers' First Amendment rights, or discourage individuals from filing complaints. Rather, it would help prevent and deter governmental participation in conspiracies to violate the constitutional rights of workers and minorities.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Filed November 24, 1998]
No. C-96 01852 CAL

RICHARD ROBERT RADCLIFFE, et al.,)
Plaintiffs,)
)
v.)
)
RAINBOW CONSTRUCTION)
COMPANY, et. al.,)
Defendants.)
)

ORDER

All remaining Defendants in this action (Rainbow Construction, Rainbow Construction, Inc., Peter A. Richardson, Douglas V. Anderson, Clifford Michael McClure, Melon L. Chichester, James W. Lambert, Christian Hans Weissleder, Susan Massini, Allen Bazzani, Jack Daniels, the County of Mendocino, and the Ukiah Unified School District) filed motions for summary judgment pursuant to F.R.C.P. 56.[1]

[1] During discovery, Plaintiffs voluntarily dismissed Defendant Associated Builders and Contractors, Golden Gate

Plaintiffs opposed these various motions, and filed a cross-motion for summary adjudication against the Rainbow Defendants on the issue of federal preemption. Rainbow opposed Plaintiffs' cross-motion for summary adjudication.

On November 6, 1998, all parties' motions came on for hearing before this court. Sandra Rae Benson appeared on behalf of Plaintiffs, Jeanine Nadel appeared on behalf of Defendants Susan Massini, Allen Bazzani and the County of Mendocino, John P. Kelley appeared on behalf of Defendants Jack Daniels and the Ukiah Unified School District, and Bradford K. Newman appeared on behalf of the Rainbow Defendants. Oral argument was heard.

The court has reviewed the moving and opposing papers, the record and the applicable authorities. For the reasons stated on the record by the court during the November 6, 1998 hearing, the court hereby grants and denies the motions as set forth below:

(1) Summary judgment is hereby granted in favor of Defendants Rainbow Construction, Rainbow Construction, Inc., Peter A. Richardson, Douglas V. Anderson, Clifford Michael McClure, Melon L. Chichester, James W. Lambert and Christian Hans Weissleder as to all causes of action stated in Plaintiffs' First Amended Complaint;

(2) Summary judgment is hereby granted in favor of Defendants Susan Massini, Allen Bazzani and the County of Mendocino as to all causes of action stated in Plaintiffs' First Amended Complaint;

Chapter.

(3) Summary judgment is hereby granted in favor of Defendant Jack Daniels as to all causes of action stated in Plaintiffs' First Amended Complaint;

(4) Because Plaintiffs failed to amend their First Amended Complaint as the court previously ordered, and for the reasons stated on the record, the Ukiah Unified School District was no longer a party at the time of the summary judgment proceedings, and therefore, all causes of action against it are hereby dismissed;

(5) Plaintiffs' cross-motion for summary adjudication is ~~hereby denied~~ moot for the reasons stated on the record;

~~(6) Defendants shall recover their costs.~~

IT IS SO ORDERED.

Dated: November 24, 1998

/s/_____
Charles A. Legge
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 96-1852 CAL

RICHARD ROBERT RADCLIFFE, et al.,)
Plaintiffs,)
)
v.)
)
RAINBOW CONSTRUCTION)
COMPANY, et. al.,)
Defendants.)
)

Transcript of Proceedings
for the United States District Court
Northern District of California
Charles A. Legge, District Judge

TRANSCRIPT OF PROCEEDINGS

[November 6, 1998]

Leo Mankiewicz,
Official Reporter

...

THE COURT: All right, we're here for several Motions for Summary Judgment, which, in toto, constitute Motions for Summary Judgment on behalf of all remaining Defendants, and a Pretrial Cross-Motion for Summary Judgment by the Plaintiff.

This comes after my ruling on two prior Motions to Dismiss, and there obviously has been very substantial discovery, and then the filing of these motions. They're, of course, governed by Rule 56, which limits me to matters which can be cited with no genuine issue of material fact, and all of the facts which I will state here in my remarks are found to be facts by that standard.

I'll first deal with the Motion for Summary Judgment by the Rainbow Construction Defendants. The basic facts, which I think probably attribute to, or - - apply to all the motions, on three separate occasions, May 19th, May 31st and September 11th of 1995, the Plaintiffs went onto the job sites and they did so without the permission of Rainbow, and each time Mr. Richardson or somebody else from Rainbow asked them to state their purpose, and the record is quite clear that they replied only that they were engaged in, quote, "Lawful Union Activity," and they declined to articulate any further the nature of their business.

The Rainbow Defendants then called the Ukiah police who refused to arrest the Plaintiffs, but Rainbow and Mr. Richardson placed the Plaintiffs, except for Mr. Streets, under citizen's arrest for trespass, and after the third arrest, Richardson went to the D.A.'s office to request a reversal of

what had been the D.A.'s prior position, that is, on the first two arrests, not to prosecute, and met with Ms. Massini. She agreed to review the files.

Then the D.A., Ms. Massini, brought a criminal complaint against these Plaintiffs for trespass, and the case went to trial. The Trial Judge dismissed Mr. Streets because he'd never been placed under arrest, and the jury acquitted Mr. Radcliffe, Mr. Taylor and Mr. Slivka, finding that they hadn't committed a trespass, because at the time they had engaged in lawful union activity under the National Labor Relations Act.

This has resulted in this action, and dealing with the Rainbow Defendants, Causes of Action 1, 3, 6, 7, 8, 9, 11, 12 and 13 against them.

First of all, dealing with the causes of action under 1983 and 1985, for use of those statutes there's a requirement that the Defendant can be a state actor. Obviously, Rainbow and its personnel are not technically government employees, so they are private citizens, but private citizens can be liable under 1983, quote, "For willful participation in joint activity with the state or its agents." So the inquiry here is whether there is sufficient evidence for a jury to conclude that Rainbow has engaged in joint activity with a state agency.

With respect to this argument, in the Complaint, the only basis for the joint action is the alleged conspiracy. In the Brief, however, the Plaintiffs raise the state aid and state compulsion. I'm going to first address the conspiracy matter, and I'll discuss those other two claims later.

So dealing with conspiracy, it's the Plaintiffs' obligation to show an agreement or a meeting of the minds for the purpose of violating somebody's constitutional rights; and the Plaintiffs have to produce sufficient evidence of this where a reasonable jury could draw inference and arrive at that conclusion. And the mere fact, of course, that one's alleged or argued is not enough. There has to be evidence to support.

I think really the most that the Plaintiffs have shown in this record is, really, a belief that there had to be joint action in order for these things to have occurred. But it's unsupported by any substantial evidence that there was a county-wide conspiracy to keep the Plaintiffs off the Construction site or to place them under citizen's arrest and prosecute them on criminal charges.

I just don't find any substantial evidence of the conspiracy at all. In fact, the evidence that I do have in front of me indicates quite the other way, that there was not a conspiracy.

Now, the Plaintiffs appear to argue that there was a conspiracy between Richardson and Daniels of the school district, and between Richardson and Massini, the District Attorney. There was some allegation or arguments about a conspiracy between Rainbow and Bazzani, but that seems to have fallen away.

Now, the evidence demonstrates that Richardson and Massini did not meet, or indeed, didn't even know one another, until after the third arrest. They presented competent - - that is, the Defendants have presented competent evidence

that Massini and Richardson did not meet prior to any of the arrests, but only after the third arrest.

There is no contrary evidence regarding those facts. There's no evidence of communications between them at all until after the third arrest. And even the Plaintiffs' own testimony, and I suppose their own - - well, I shouldn't say arguments - - their own testimony supports that.

Now, they argue - - Plaintiffs argue that a conspiracy can be inferred from the fact that Massini disregarded or overruled the decisions of her two deputy district attorneys, but she's the boss. She was the boss. She doesn't have to follow the direction of her subordinates, and the mere fact she agreed to review the file and then did what her deputies had recommended against, it is certainly no evidence of a conspiracy.

With respect to the alleged conspiracy between Richardson and Daniels, this comes down to four things: Richardson's letter to the Plaintiffs, strangely not even Daniels, but the Plaintiffs, of October 12, '94; Daniels' letter to the Plaintiff Mr. Radcliffe of October 19th of that year; and then the following year, Daniel's presence at the school job site, where he told the Plaintiffs - - told the police the Plaintiffs didn't have permission; and Daniels' letter later detailing the events of May 16th incident.

There is just no evidence there to support any kind of finding whatsoever that there is a conspiracy between Richardson and Daniels. There's simply no evidence there to support that.

Now, as I said, in the Briefs but not in the Complaint, the Plaintiff has argued for two other bases of joint action. One is the theory of petitioning and receiving of state aid; but there's no evidence to support that. Certainly going to the District Attorney and asking for prosecution isn't enough. That would make every citizen who complains to the police or a district attorney a state actor, and the cases don't support such an extension of the principle at all. Can this be found from the fact that a contractor for an agency has control of the work site? I certainly don't think so.

The second is compulsion of state law, but there's no evidence of the policy, if that's what it is, that the Plaintiff contends for, and one act of prosecution is not enough, and the application to this case of the authorities that Plaintiff has cited in the Briefs in support of this just simply do not support the proposition at all.

I again repeat that as far as the joint action is concerned, the only thing alleged in the Complaint is conspiracy.

So summary judgment will be granted on Counts 1 and 3, the 1983 and '85 counts.

We then come to the state law causes of action, Numbers 6 through 9, Summary Judgment will have to be granted on all of those counts.

First of all, Plaintiffs Mr. Radcliffe and Mr. Taylor and Mr. Slivka are collaterally estopped from arguing that there was a lack of probable cause for their arrest or prosecution, and that's because the Superior Court's ruling against them

before their trial under Penal Code 1118.1. The Court there decided there was probable cause, and that is the end of the matter.

Mr. Streets' complaints with respect to certain of these matters has to be ruled against because he was never placed under arrest by the Rainbow Defendants. Also Mr. Streets has not produced any evidence that the Rainbow Defendants initiated or instituted the criminal proceeding against him.

Dealing with the state tort of the intentional infliction of emotional distress, there are four elements for that: one is outrageous conduct, second is intent, third is severe emotional suffering, and the other is actual and proximate cause of some emotional distress.

The basic definition for "outrageous" is so extreme as to exceed all bounds of that usually tolerated by a civilized society. As one California Appellate Court has said, it means emotions distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it.

Does that exist here? First of all, with respect to Mr. Radcliffe, the facts of his arrest certainly don't demonstrate that at all. And this comes from this testimony. He was asked to leave the construction site numerous times before he was placed under arrest. In fact, on the May 19th arrest, he walked off the site to get his wallet and walked back on the site so he could be arrested with identification. He voluntarily placed his hands behind his head to facilitate the arrest, and the arrest was otherwise unremarkable.

And I again note he declined to say what his union business was and just simply said, "I'm here on union business."

There was apparently some profanity used at the time of the May 19th arrest, but it's - - the record demonstrates the profanity was used on both sides, that of Radcliffe and Richardson.

So there is no evidence that Radcliffe suffered any distress of the type I've just defined that's necessary for a cause of action, and in fact, in his deposition his testimony indicates he hasn't suffered any emotional distress whatsoever. And in his - - well, in his declaration submitted in his opposition to this motion, he says nothing about emotional distress.

With respect to Mr. Taylor, that results from allegedly two incidents. One is his arrest on May 31st, and the second is his prosecution. But the citizen's arrest doesn't indicate any outrageous conduct. There was no violence, no profanity, no insults, no yelling. In fact, his testimony indicates - - Mr. Taylor's testimony indicates that it was really an event that was so minor that, at his deposition, he couldn't really remember what it was all about.

Further, in his deposition, he admitted he has not suffered any emotional distress, and he doesn't provide or didn't provide a declaration in support of his opposition to this motion.

With respect to the Plaintiff Mr. Streets, two incidents. At the May 19th incident, Mr. Streets was not placed under

arrest. He voluntarily walked off the property when he was told he would be arrested, remained outside the property, couldn't hear any of the dialogue that occurred when Mr. Radcliffe was arrested.

The second event the emotional distress appears to be premised on is the District Attorney's criminal prosecution, but both the District Attorney and Rainbow Defendants have prosecuted the Plaintiffs, so there's certainly no outrageous behavior on Rainbow's part here in connection with that prosecution.

And again, looking at their testimony, there's no evidence that he states in his deposition of any emotional distress whatsoever; and in his declaration submitted in support of this Motion, or the opposition to this Motion, Mr. Streets doesn't mention any emotional distress suffered by him.

The negligence cause of action, the 12th cause of action. All that fails because of a lack of showing of any damages. It's an inherent part of any negligence claim that there be actual loss, injury, damages. The Plaintiffs have not produced any evidence that they suffered any damage. In fact, as I have said, each Plaintiff testified in his deposition that he's not suffered any monetary or emotional injury or physical injury on account of the alleged negligence.

With respect to Mr. Radcliffe - - indeed, with respect to all the Plaintiffs - - they really haven't produced any declarations regarding damages in response to this motion. I'm left with, what's in their depositions and their depositions show no damages.

The 13th cause of action for the negligent infliction of emotional distress, that is part of the, again, the tort of damages - - tort of negligence, I should say, and requires the additional element of serious emotional distress, but for the same reasons as to the 12th cause of action, there just is no evidence on the 13th.

Now, the Defendant has raised an additional grounds of preemption, and the Plaintiff has cross-moved on that issue, and I have not addressed it at all. I'm granting the Rainbow Defendants for Summary Judgment based on the above grounds that I've just stated, so there's no necessity to consider the preemption issue, and I'm not considering it.

So the Motion for Summary Judgment will be granted in favor of the Rainbow Defendants on all of the causes of action.

Considering next the Motions of the governmental defendants, that is, the County of Mendocino, District Attorney Massini, and Mr. Bazzani, all of those parties seek summary judgment on the nine claims that have been brought against them.

As we all know, Ms. Massini was the District Attorney in Mendocino County at the time. She's sued in both her official and individual capacities. The charges against her stem from her decision to charge and prosecute the plaintiffs for criminal trespass under California Penal Code Section 602(N).

The claims against Mr. Bazzani, who is again sued - - who was also, I should say sued in both his official and individual capacity, is based on two events. One is the

citizen's arrest or Mr. Radcliffe on May 19th, a claim that he improperly delegated complete authority over property to private individuals, specifically the Rainbow Defendants, and that he approved the Rainbow Defendants' unlawful interference with and denial of Plaintiffs' federal rights, and that Mr. Bazzani exceeded his authority and authorized Rainbow to place the Defendants under arrest.

These facts and charges form a basis for - - one, two, three, four, five, six, seven, eight - - nine causes of action alleged against those Defendants.

I'll first of all deal with the District Attorney Massini and her claim of absolute immunity. The immunity from liability is governed by federal law, and state law governs the immunity from liability for state claims. Sued in both capacities, she claims absolute prosecutorial immunity from both the federal and the state claims.

First of all, dealing with the federal claims, the key case on this is *Imbler v. Rachtman*, and the Supreme Court says that state prosecutors are absolutely immune from liability under 1983 for conduct that is intimately associated with the judicial phase of the criminal process, and that includes initiating prosecution and presenting the state's case and participating in probable cause hearings.

And of course, Ms. Massini contends that her decision clearly fell within that prosecutorial immunity, and that her decision to charge and prosecute was based on the information contained in the police reports.

The Plaintiff says that, no, this immunity doesn't apply, because in this case the Plaintiffs clearly fell within an exemption of the trespass statute for union activity; which I suppose is a way of saying Ms. Massini was, A, wrong, and B, so wrong that it was totally outside her jurisdiction.

But Plaintiff's argument in that regard is really based upon two things: an examination of after-the-fact evidence that was not in front of Ms. Massini at the time, what she knew and did tat the time; and secondly, Plaintiffs' reliance on *In Re Catalano* as a blanket exemption from the trespass statutes.

I think that *In Re Catalano* is being applied here - - or attempted to be applied here far beyond what the scope of the case authorizes. A key fact that the Plaintiffs leave out in their use and analysis of *Catalano* is that the Petitioners in that case informed the property owner of what their business was, where in this case Plaintiffs admit that they did not articulate or explain anything about why they were there, other than, quote, "Lawful Union Activity."

Now, Ms. Massini determined, based on the record in front of her, that there was perhaps a legal issue as to whether the trespass was lawful, perhaps whether they had jurisdiction - - whether they had the exemption. But those were matters which were safely within Ms. Massini's authority as a prosecutor to decide whether to file or not.

With respect to the state law claims, California has an immunity statute, Section 821.6 of the Government Code specifically which goes broader, even, than the federal immunity, in that it provides immunity not just for malicious

prosecution charges, but also for immunity for any injury caused by the prosecution.

Now, Ms. Massini has also been named not just in her individual capacity, but also in her official capacity, and hence, we have the County of Mendocino, because official capacity suits are really just another way of pleading an action against the entity of which that person is an agent, and Defendant contends here that the Plaintiffs can't maintain their 1983 case against her because she constituted, in this State, the State of California, and not the county, and the State cannot be sued for violations of Section 1983.

Based on the recent California Supreme Court case in *Pitts v. The County of Kern,* I think she's absolutely correct. The Court held that the District Attorney represents the State, not the county, and that as a State agent, is not subject to a suit under Section 1983.

Now, the Plaintiffs argue that Mr. Massini was not enforcing the law of the State because she had a personal political and economic interest in the charges against them. I really haven't addressed this argument because I don't believe there's any admissible evidence that really focuses, or sufficient for a jury to draw an accusation.

We have this internecine warfare with the D.A.'s office, but there isn't sufficient evidence there that her true motivation was political or economic, and no reasonable inference could be drawn about it. All the evidence we have is that she decided to file a criminal charge and prosecute the Plaintiffs, and the available evidence demonstrated that she was

enforcing the Penal Code Section 602. Whether she was right or wrong doesn't alter the fact that she's entitled to immunity.

As to the county of Mendocino and the *Monel* claim, Plaintiffs allege that Ms. Massini prosecuted the Plaintiffs in conformity with the county policy. Mr. Bazzani refused to give the Plaintiffs permission to visit the job site in conformity with county policy, and somehow this joint conduct gives rise to an inference that they were acting pursuant to a county custom and policy of unlawfully using law enforcement officers in the criminal courts to prosecute union representatives.

The single action, involving Mr. Bazzani, to establish this custom and policy was that he failed to prevent the arrest of the Plaintiffs, and that demonstrates a policy adopted and promulgated by the County of Mendocino, to which I say "nonsense" on two grounds: One is simply because it's nonsense, and the other is that even a single incident of unconstitutional conduct does not give rise to a policy.

Plaintiff argues that Massini had a history of prosecuting cases which lacked merit. The argument is irrelevant to any contentions that Massini was acting here in conformity with the county policy of prohibiting union access to job sites.

The Plaintiffs have not offered any evidence at all to demonstrate that Massini's actions were taken as a part of any policy to deprive union representatives of their federally protected rights.

Furthermore, because she's a prosecutor, or just because she's a prosecutor, her actions don't make her a policy maker for every decision that she makes within her office. That's not enough for a county policy.

Now, the Plaintiffs are stretching this even further with an argument about failure to train the employees, but that is a stretch. This isn't in the Complaint, and I'm not going to consider it any further.

With respect to qualified immunity, there is the requirement in there that the actors, in order to have qualified immunity, must - - in order to have liability, overcome - - for the Plaintiff to overcome the qualified immunity, the Defendants had to know that they were violating a clearly established right and acted with knowledge that their acts were unlawful. Plaintiff contends that's so because the rights here of the Plaintiffs were protected by Section 7.

But given the fact, and it is the fact, that the Plaintiffs didn't articulate why they were on the property other than, the quote, "Lawful Union Activity," the Defendants didn't violate any clearly established right. It's unclear whether they were engaged in protected activity or not.

And as for the allegations against Bazzani, Mr. Radcliffe admits that Mr. Bazzani didn't do anything. There is certainly no evidence that Mr. Bazzani violated any clearly established right, or indeed, as far as I can see, any right at all.

I think, furthermore, the only reasonable inference a jury could draw was that one of ordinary care and prudence could have concluded that Plaintiffs - - could not have

concluded that Plaintiffs had violated - - I'm sorry - - could have concluded that Plaintiffs violated the criminal justice statutes of the State.

So Massini and Bazzani are also entitled to summary judgment, not only for absolute immunity for one, but qualified immunity as to both.

With respect to the state law claims, these are also barred by Ms. Massini's's immunity, which I have discussed above, and I don't believe that Mr. Bazzani can be held liable for state torts. Plaintiffs have no evidence that his alleged refusal to allow them onto the county administration site caused them any severe emotional distress or injuries. He did not arrest the Plaintiffs, he didn't initiate the criminal proceedings against them, and by no stretch of the imagination could his conduct be considered so extreme as to exceed all bounds tolerated by a civilized society, and really Plaintiffs haven't articulated any duty under the state law claims owed by Bazzani nor produced any reasonable evidence on the breach, and I again refer to my remarks in connection with the Rainbow Defendants' Motion about the testimony of the Plaintiffs as to the absence of the state law causes of action.

More with respect to the conspiracy allegations, the third cause of action against these Defendants, Plaintiffs' conspiracy claim alleges that Massini met with the other Defendants to determine what policy her office should take with respect to the Plaintiffs, and additionally with Rainbow, to promise prosecution of the state law causes of action.

I've already addressed that to this extent: that there just simply is no evidence of any meeting at all between Rainbow

and Massini until after the third arrest. The allegation of Paragraph 26 of the Amended Complaint is just patently unsupported by any evidence.

With respect to Mr. Bazzani, when he met on other occasions with Rainbow to discuss the Plaintiffs' presence at the job site, it's alleged that he knew and approved Rainbow's intent to arrest them for trespassing, but there's not a shred of evidence on that, just no evidence to support it, and that's the best thing I can say.

So the Motions for Summary Judgment of the County Defendants - - and that is the County, Ms. Massini and Mr. Bazzani - - will be granted.

We then have the Motion for Summary Judgment on behalf of the School District and Mr. Daniels.

With respect to the School District, I don't believe we've really got a Motion for Summary Judgment here. On May 30th, 1997 I granted a Motion to Dismiss, and I determined that the School District was sued only in the first and third causes of action, and I dismissed the School District with prejudice as to the first, and without prejudice as to the third, and granted Plaintiffs 30 days' leave to amend, and they've not filed a Second Amended Complaint against Ukiah School District. So Judgment's appropriate to be entered against them.

Against Mr. Daniels we have - - one, two, three, four - - we have four causes of action alleged against Mr. Daniels. Plaintiffs claim that Mr. Daniels impermissibly delegated to

rainbow the right to control the job sites, and that his actions resulted in their arrest, and that this was outrageous conduct.

What are the facts? Mr. Daniels first became aware of the Plaintiffs in the fall of 1944 when the school received numerous requests for documents regarding asbestos and prevailing wages from Mr. Radcliffe. Mr. Daniels was required by law to turn over these requested documents, and did so. Apparently, he didn't like it, thought it was a nuisance, didn't have much faith or didn't believe much in current so-called prevailing wages laws, but he did it.

On October 19th, Daniels got a letter, or sent a letter to Mr. Radcliffe, which describes the district's policy for school visitors, which, when you read it, is just nothing but pure vanilla, and it is just setting forth the procedural requirements to come on.

On May 16th, Mr. Radcliffe and Mr. Taylor attempted to enter the school site and Mr. Richardson stopped them, and called Daniels to come to the job site. Upon his arrival, the Ukiah police asked whether Daniels had given Plaintiff permission to enter the site. He indicated that he had not, but that he was unsure who had the legal authority to allow it. So he called the superintendent, who then checked with legal counsel, and by the time they got back to Mr. Daniels and he got back to the site with the information, the Plaintiffs had already left the premises, and no arrest took place.

On May 31st, when the Plaintiffs again attempted to enter the site, they refused to leave, and they were placed under arrest by Mr. Richardson. Mr. Daniels didn't learn of this arrest until several days later. The Plaintiffs contend that

he knew of the visit and the earlier arrest, but no evidence has been provided. That's strictly an argument of what he must have known or should have known.

So to contend that somebody with that tangential a connection with these events was performing some unconstitutional act is really beyond the pale.

With respect to the Ukiah School District, as I've already said, they should be dismissed because there was no evidence against them.

Qualified immunity as to Mr. Daniels, I think Summary Judgment's appropriate there because certainly his conduct on May 16th didn't result in the deprivation of anybody's constitutional rights.

More generally, the accusation that he impermissibly delegated the right to control the job site certainly didn't occur on May 16th, and the Plaintiffs voluntarily left the premises before Daniels returned with the word from the school superintendent, or the district superintendent, and attorney.

With respect to the second one, again, he wasn't called, he wasn't present at the time of the arrest, and Plaintiffs have provided no evidence that he had anything to do with the arrest.

I suppose there could be a difference of opinion, a difference of authority as to whether a public entity engages a contractor, contractor enters on the work site, who's got control over the premises? Well, practical control, of course, is the control of the contractor, with the right, perhaps in some

cases the duty, of the land owner, the agency, to see what's going on. But the transient nature of these events is such that there is no improper delegation here at all.

Even if denial of permission on May 16th was unconstitutional, Mr. Daniel's conduct was perfectly reasonable. He went to clarify the situation, and got the response, and by the time he got the response, nobody was there anymore.

I don't think Mr. Daniels' letter of the 19th really needs to be gone into, although the Plaintiffs argue and the Defense argues over whether it means school campus access or construction site access. But that isn't the stuff of constitutional violations. He did the reasonable thing, and that's all that can be said about it, and he didn't know anything about the subsequent arrest.

With respect to the state law claims, there just isn't sufficient evidence that a reasonable jury could find outrageous conduct on the part of Mr. Daniels or any intent to injure or any causation.

The two remaining state law claims, negligence, there's no evidence presented by the Plaintiffs in support of the negligence claim. As I've said earlier, Plaintiffs in their own depositions testified that there was no damage.

So the Summary Judgments will be granted in favor of the Ukiah School District and Mr. Daniels.

Now, I believe that this then results in Summary Judgment in favor of all the remaining Defendants in the case,

and I will ask the Defendants to submit to Plaintiff's counsel and to me an appropriate form of Order and Judgment. You need not recite in your Orders the reasons I've given here in the record. You can just simply recite in the Orders that my reasons were stated, perhaps, *ad nauseam*, and perhaps repetitively, on the record here today in open court.

The final matter is a Motion for Rule 11 Sanctions, and I am not going to rule on that Motion at the moment. It's the last one in the series, and I had plenty to do to get through this three-foot pile of paper to rule on your substantive motions, but I just want to put out a few thoughts preliminarily.

I generally consider conduct justifying Rule 11 sanctions as tantamount to an intentional tort, but I think it has to be considered here. What happened here, in the broad spectrum of things, is obviously a clash of jurisdictions, and then it got built into a clash of egos and a clash of emotions, between the Plaintiffs and the Defendant Richardson, perhaps other people at Rainbow.

The Defendants won round one, but the Plaintiffs won round two. But then we have this action, which blows all of these events out of all proper proportion, and it's created loggering on the Plaintiffs' part and extension of the facts, extension of the law, extension of the evidence to cover the emotion that both sides, but particularly the Plaintiffs' side, has brought to this.

It's also clear from my to prior orders that I considered the allegation of conspiracy a key point. When I granted the Motion for Summary Judgment the first time, I pointed to it,

the allegation of conspiracy, and said, Plaintiffs, you've got to beef this one up.

So when Paragraph 26 came in the second time, as my Order will reflect, it was a major reason for my holding Rainbow - - and maybe the other Defendants, but I'll just say Rainbow - - into the case. And that was the key allegation, and it just seems to me, from reading Paragraph 26, that there is and has been no evidence at all to support the allegation that, prior to his arrests, that there was any meeting with Ms. Massini and anybody dealing with having the Plaintiffs arrested and prosecuted, and that's the key charge in the conspiracy.

So I'm sincerely concerned about that, but I have not analyzed it yet. I have not even had an opportunity to do anything more that just summarily read your Briefs on the subject. So I'm not making a ruling on that.

Now, as I recall the record, and my notes indicate from the record, we still have a cross-claim by the Defendants, so I'm going to set a status conference for December the 4th at 11:00 o'clock - - no let's make it 9:30, to consider what steps - - that is, to set procedures and dates for the counterclaim if that's going to be prosecuted, and at that time I will also give further consideration to the Rule 11 Motion, and either side is free to add whatever they want to add to the Rule 11 Motion issues by November 23rd.

Okay, thank you very much.

MR. NEWMAN: Thank You, Your Honor.

MS. NADEL: Your Honor, excuse me. I just wanted to clear up one thing. A couple of times during the ruling you referred to the District Attorney as "Ms. Bazzani" and I just wanted to make sure - -

THE COURT: I'm sorry. All the way through I was confusing the names Massini and Bazzani. They sound similar to me. I don't know them. So obviously, I'm referring to the District Attorney, Ms. Massini, and to Mr. Bazzani.

MS. NADEL: Thank You.

(Reporter's Note: During the recital of the Rulings above by the Court, the Reporter also noticed this mispronunciation of names mentioned by Ms. Nadel, and corrected the record as the Judge spoke.)

(2)

No. 01-424

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RAINBOW CONSTRUCTION COMPANY, A PARTNERSHIP; RCMC, INC. d/b/a RAINBOW CONSTRUCTION COMPANY; PETER A. RICHARDSON; DOUGLAS V. ANDERSON; CLIFFORD MICHAEL MCCLURE; HELON L. CHICHESTER; JAMES LAMBERT; AND CHRISTIAN HANS WEISSLEDER,

Petitioners,

v.

RICHARD ROBERT RADCLIFFE; CHARLES MELVIN TAYLOR; ANDREW SLIVKA, JR.; AND JAY STREETS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

SANDRA RAE BENSON *
MICHAEL B. ROGER
VAN BOURG, WEINBERG, ROGER & ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether tort claims for false arrest, false imprisonment, and malicious prosecution are preempted by the National Labor Relations Act ("NLRA") where it is mere speculation that a court would consider the NLRA in rendering a decision as to liability, and in the event such consideration were deemed necessary, it would be ancillary to the primary issues raised by the personal injury claims.

2. Whether petitioners failed to present to the Ninth Circuit the issue of NLRA preemption of California Penal Code § 602(n), thus rendering the issue inappropriate for Supreme Court review.

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JURISDICTION

Petitioners invoke Supreme Court jurisdiction pursuant to 28 U.S.C. § 1257(a), which provides discretionary review of "[f]inal judgments or decrees rendered by the highest court of a State." The Ninth Circuit is not the highest court of the State of California, nor was its June 13, 2001 decision, affirming in part, reversing in part, and remanding, a final judgment or decree. Therefore, 28 U.S.C. § 1254(1) seems the appropriate basis for United States Supreme Court jurisdiction in the present case.

STATEMENT OF THE CASE

I. OVERVIEW

California's trespass statute excludes from the rights it confers on property owners the right to exclude from their property "persons engaged in lawful union activities" permitted by state and federal labor laws. Cal. Penal Code § 602(n). Petitioners ask the Court to find that Congress has abridged the right of California to exclude persons engaged in "lawful union activities" from the purview of its own criminal trespass laws. Property rights are quintessential matters of state law and California has a long history, based primarily on the right of free speech granted by its own Constitution, of allowing union activity to take precedence over property rights. Yet, in the name of federal labor law, Petitioners argue that the State of California must allow employers to imprison, arrest, and prosecute for trespass union representatives who peacefully enter their property to conduct safety inspections and check for prevailing wage violations.

Petitioners' theories for the preemption they seek are unsupported by California or federal law. This Court has found that state trespass statutes are not preempted by federal labor law except where they interfere with federal rights guaranteed by the National Labor Relations Act. *See Sears,*

Roebuck & Company v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978). The legislative history of the state labor exemption shows that the statute is to be construed in harmony with the NLRA. Thus, Petitioners' effort to fabricate a potential conflict between California and federal law based on California's tolerance of lawful union activities on private property is unpersuasive.

II. FACTUAL BACKGROUND

Respondents incorporate by reference the Factual Background section from the Ninth Circuit decision in this matter (254 F.3d 772, Pet. at 4a-10a) as a factual overview of the events leading to this petition. Additionally, Respondents supplement the facts asserted by Petitioners as follows:

Petitioners describe at length the factual background of their citizen's arrests of Respondents Richard Radcliffe, Charles Taylor, Andrew Slivka, and Jay Streets ("Business Agents" or "Union Representatives") and the consequent criminal prosecution. Petitioners omit, however, one crucial fact: there has never been, at any stage of this six-year litigation, any allegation or evidence that the Business Agents were engaged in any unlawful conduct on the public construction sites at issue here.

No one ever has claimed that the Business Agents disrupted the work in any way or engaged in any destruction of property. Petitioners have not advanced a theory concerning how the Business Agents' conduct could have been prohibited under the NLRA. Thus, there is no evidence that the Business Agents' activities fell outside California's exemption of "lawful labor union activities" from its trespass statute.

Petitioners place unwarranted emphasis on the fact that the Business Agents refused to specify their intended activities to the employer whose operation they were investigating (see Pet. at 6, 7). In reality, the Business Agents' activities were

not a mystery to any of the parties. The record below is replete with evidence that the employer, the public owners of the sites, and the police all knew and understood that the Business Agents were monitoring Rainbow's non-compliance with health and safety regulations and California's prevailing wage statutes.[1]

Although Petitioners state "[t]here were no union subcontractors or union represented employees present at the construction sites on the days the arrests were made," they fail to inform the Court that Rainbow had retained union subcontractors signatory to the Carpenters' Master Collective Bargaining Agreement to perform portions of the work. (ER 723 at p. 69:10-70:2, ER 724 at p. 75:21-76:4, ER 725 at p. 126:13-22, ER 789:13-24). Thus, the Union Representatives knew that members they represented would be working on

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[1] Examples of evidence concerning Rainbow's knowledge of the nature of the activities: (ER 770:9 - 771:4; ER 771:9 - 772:4; ER 635 at ¶ 9; ER 159-160) (prior to the arrests and based on information gleaned from public record requests and job site inspections, the Union Representatives had filed numerous good faith complaints with the California Labor Commissioner, the EPA, and OSHA concerning the Rainbow public works jobsites); (ER 307-308) (Rainbow's letter indicating knowledge that Union Representatives had entered construction jobsites to conduct inspections and "verify compliance with prevailing wage law"); prior to the arrests, due to Union Representatives' formal complaints (*e.g.*, ER 159-160), Rainbow had been assessed penalties for failure to pay prevailing wages at public works jobsites (*e.g.*, ER 163); (ER 811 at pp. 619-20) (prior to one of the arrests, a California OSHA Inspector visiting Rainbow regarding a complaint recalled that Rainbow President Richardson had said he was expecting such a visit because other agencies had already been there "in regards to a complaint by the union" about asbestos exposure). Likewise, the owners of the sites knew the intended purpose of the inspections because the Union Representatives had informed them prior to the visits. Finally, the Union Representatives had visited the police station before the visits and had made known their intentions.

these jobsites at some point during the construction. (ER 789:13-24).

The Carpenters' Master Agreement contains a specific provision guaranteeing unrestricted union access to jobsites. (ER 937-939) ("Union representatives shall be permitted *at all times* upon any place or location where any work covered by this Agreement *is being, has been or will be* performed.") (emphasis added). Thus, the Union Representatives enjoyed both a statutory (Cal. Penal Code § 602(n)) and a contractual right to perform lawful union activities on the Rainbow job sites.

After several prior visits that did not result in arrests, Rainbow effected citizen's arrests of the Union Representatives on two consecutive occasions. Each time the charging deputy district attorneys declined to prosecute determining that the Union Representatives' actions were not criminal in nature based on California's statutory (Penal Code § 602(n)) and case law (*e.g.*, *In re Catalano*, 29 Cal.3d 1 (1981)). It was after the third arrest, and a personal visit to the Mendocino County district attorney by Rainbow's president, that the prosecution for these entries was begun. After a lengthy criminal trial, the Union Representatives were acquitted of criminal trespass.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' QUESTIONS PRESENT NO CONFLICT BETWEEN CIRCUITS AND THE RELEVANT ISSUE AFFECTS ONLY A SMALL NUMBER OF CASES.

The Union Representatives are aware of, and Petitioners have cited, no state laws, in California or other states, which present the same or an analogous issue to that which Petitioners raise here. The fact that Petitioners provide no evidence of any analogous issue in any other forum narrows

the predicted "conflict" raised by this preemption issue to the class of cases arising in California, wherein persons engaged in lawful labor union activities on private property are falsely arrested on trespass charges, falsely imprisoned while on the private premises, and maliciously prosecuted for the unwarranted trespass charge.[2] Petitioners have presented no evidence that the incidence of this type of case is high in California. Counsel for the Union Representatives in this action have been in practice as a union-side labor firm in California since 1958. Respondents' counsel assert that such a case would arise only under a rare combination of circumstances.

II. THIS COURT HAS ACKNOWLEDGED THAT THE STATES HAVE A PRIMARY RIGHT TO REGULATE ACCESS TO PROPERTY AND HAS REJECTED A PREVIOUS PREEMPTION CHALLENGE TO CALIFORNIA'S TRESPASS STATUTE.

A. Rainbow simply does not agree with California's policy of broad access to property for labor activities.

It is universally acknowledged, even by Petitioners (Pet. at 12, fn.5), that states retain certain rights to regulate access to property within their boundaries and may expand access for labor activities beyond the minimums dictated by the NLRA.[3]

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[2] Indeed, this case does not even present an issue of *private* property since the property at issue was *public* property and California clearly has a right to regulate access to public property in the State.

[3] *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994) (state property law creates interest entitling employers to exclude [nonemployee union representatives] in the first instance—where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) of the NLRA); *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436

The State of California has a long history, based primarily on the right of free speech granted its citizens by its own Constitution and codified state public policy,[4] of allowing union activity to take precedence over naked property rights.[5] The enactment of Penal Code § 602(n) in 1978 is a manifestation of this state policy.

U.S. 180, 198 (1978); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992); *Bristol Farms*, 311 NLRB 437, 143 LRRM 1217 (1993) (employer cannot prohibit activity in shopping center where California law provides right of free speech on such property); *Indio Grocery Outlet*, 323 NLRB No. 196, 155 LRRM 1210 (1997) (under California law, store owner has no right to exclude union members from walkway in front of store); *enf'd as NLRB v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999); *O'Neil's Mkts. dba Food for Less*, 318 NLRB 646, 150 LRRM 1128 (1995), *aff'd in relevant part*, 95 F.3d 733, 738-39 (8th Cir. 1996) (burden on employer to establish interest in property entitling it to exclude those entering property under claim of Section 7 right); *Johnson & Hardin Co.*, 305 NLRB 690 (1991), *enf'd*, 49 F.3d 237 (6th Cir. 1995) (employer lacking right to exclude others violates Section 8(a)(1) when it removes Section 7 actors).

[4] The individual worker must "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Cal. Labor Code § 923.

[5] *See, e.g., Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964) (peaceful union picketing in privately owned shopping center not trespassory); *In re Lane*, 71 Cal.2d 872 (1969) (union hand billing on private sidewalk in front of store not trespassory); *Agricultural Labor Relations Bd. v. Superior Ct.*, 16 Cal.3d 392 (1976) (state statutory and administrative law may authorize access and organizing on a private employer's property); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979)(peaceful union picketing in privately owned shopping center not trespassory); *In re Zerbe*, 60 Cal.2d 666 (1964) (union official positioned in railroad right-of-way in connection with picketing was not trespassing).

Petitioners dislike California's legislatively and judicially mandated preference for concerted activity over private property rights. They wish to convince this Court that it is impossible for a state, without infringing on the exclusive jurisdiction of the NLRB, to determine its own balance between labor's right to free expression and a property holder's right to prevent that free expression on his or her land. As decisions by this Court, the NLRB, and the California courts show, the doctrine of *Garmon* [6] preemption does not dictate a divestment of the State's fundamental right to define its own property laws.

B. This Court specifically has rejected Rainbow's assertion that California's trespass statute is preempted.

This Court and the California Supreme Court foreclosed Rainbows' assertion that the state trespass law is preempted by the NLRA more than twenty years ago. In *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court determined that California's trespass statute, which, at that time did not include § 602(n) as it now appears, was not preempted by the NLRA under the circumstances of a labor dispute. The Court decided that

> permitting state courts to evaluate the merits of an argument that certain trespassory activity is protected [under the NLRA] does not create an unacceptable risk of interference with conduct, which the Board, and a court reviewing the Board's decision, would find protected.

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[6] *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

Sears, 436 U.S. at 205. Finding no significant risk of interference with federal labor policy, this Court remanded the trespass action to the California Supreme Court for further proceedings.

This Court's prediction that no conflict would arise has been borne out in *Sears* and subsequent cases. On remand, in *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979), the California Supreme Court held explicitly that Penal Code § 602(n), (which had become effective January 1, 1979), merely codified already existing law and noted that "union activity protected by state or federal law clearly does not violate any subdivision of Penal Code 602." *Id.* at 330, fn.9. The court held that "the decisions of the United States Supreme Court and of this court recognize that the State of California, by statute or by judicial decision, may permit union activity on private premises." *Id.* at 328. Relying on the State's Moscone Act (Code of Civ. Pro. § 527.3), and prior state court decisions, the court decided that peaceful picketing on a privately owned sidewalk did not constitute a trespass because it was "lawful activity" as a matter of state law. *Id.* at 325-28. Thus, despite the reference to the NLRA in the state's trespass statute, neither state court construction of the NLRA, nor any conflict with any Board decision arose.

Likewise, in a later construction of § 602(n), the California Supreme Court based its construction of California's access regulations *solely* on California labor policy, statutes, and case law. *In re Catalano* presented facts identical to this case: Carpenters' Union representatives, who were policing the selfsame collective bargaining agreement as that at issue in this case, entered a construction site to inspect safety conditions and prepare a shop steward's report. When they refused to leave upon request by an agent of the landowner, they were arrested and convicted of trespassing. *In re Catalano*, 29 Cal.3d at 3.

The California Supreme Court held that whether a union official's entry on a private site is trespassory or not "turns simply on whether [the] conduct was 'lawful' activity within the meaning of our decisions in *Schwartz-Torrance* [*Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal.2d 766 (1964)] and *Sears* [*Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d 317 (1979)], and thus exempt from prosecution under section 602." *In re Catalano*, 29 Cal.3d at 14. The court looked to "[1] customary and accepted practices of the construction industry, and to [2] a balance of the respective interests of the union and the landowner" to determine that the disputed conduct therein was "lawful union activity." *Id.* at 14-15. No construction of the NLRA was required or attempted, no conflict engendered.

As shown above, the State of California consistently has turned to its own Constitution, labor law, and case law to determine any issues presented by the enforcement of the trespass statute and its labor activity exemption. The Ninth Circuit was clearly correct in opining that there was little realistic risk of interference with the Labor Board's primary jurisdiction due to the inclusion of the phrase "permitted under the NLRA" in the trespass exemption. The court's conclusion was based on the fact that "the Board ordinarily leaves to the State the question of whether non-employee union activity may be conducted on the employer's property."[7] Pet. at 25a, citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

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[7] Petitioners mistakenly attributed to the Ninth Circuit the view that "in classes of cases involving trespass, California is free to devise its own rules as to what constitutes 'lawful union activity' under the NLRA." Pet. at 11. This was not the court's reasoning. The Ninth Circuit's statement was that California was free to determine what a union representative must say to an employer when entering private property, because in doing so it was construing its own law (not the NLRA), which already provides

Rainbow's contention that the California Legislature wrote the "trespass law in a manner that requires a state court to interpret the NLRA *without deference to the NLRB*" (Pet. at 19 (emphasis added)) is designed to raise the illusory specter of potential conflict. In fact, Rainbow's contention conflicts with both documented legislative intent and with the California Supreme Court's interpretation of the statute. As shown above, California's Supreme Court actually interpreted the statute's reference to the NLRA as recognition of federal law's supremacy in this arena. *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 25 Cal.3d at 331, fn.9; *see also In re Catalano*, 29 Cal.3d at 13-14.

Likewise, the statute's legislative history reveals that the California Assembly expressly dictated that the code was to be "construed . . . pursuant to the decisions of the Agricultural Labor Relations Board and the National Labor Relations Board" to prevent "a local judge from interposing his or her judgment as to what constitutes a labor union activity."[8]

The California Legislature's inclusion of the NLRA in the state statute was not meant to supplant its wisdom for that of the NLRB in determining what is or is not lawful union business. Instead, the California Legislature deferred, codified, and recognized that the NLRA provided additional rights to union representatives to enter private property, and that, as such, the California Legislature would be in conflict with those rights if it criminalized such an entrance on private property as trespass. Speculation that a conflict might arise is unwarranted.

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more access to union representatives than required under the NLRA pursuant to *Lechmere*. Pet. at 25a.

[8] Charles R. Imbrecht (sponsor), Letter to Chief Clerk of the Assembly of 1978 (8/31/78); Charles R. Imbrecht, Letter to Honorable Edmund G. Brown, Governor of California (9/15/78).

III. THE NINTH CIRCUIT'S ANALYSIS, AND ITS CONCLUSION THAT THE SUBJECT TORTS ARE NOT PREEMPTED, ADHERE TO ALL U.S. SUPREME COURT DECISIONS CONSTRUING THE DOCTRINE OF *GARMON* PREEMPTION.

A. Because the focus of a court's inquiry in addressing the state tort claims would not be identical to the focus of an NLRB inquiry, preemption is unwarranted.

This Court repeatedly has held that the NLRA does not necessarily preempt state tort laws that implicate the NLRA. *See, e.g., Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (defamation not preempted); *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, et al*, 430 U.S. 290 (1977) (intentional infliction of emotional distress not preempted); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (state laws prohibiting violence not preempted). The question for preemption purposes is whether state court jurisdiction over a claim will unduly interfere with the federal administration of national labor policies. *Farmer*, 430 U.S. at 300, explaining *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). The mere fact that the same conduct gives rise both to state tort claims and unfair labor practice charges does not mean the state claims are preempted. *See Farmer*, 430 U.S. at 303-04. As long as the legal question to be decided under state law is not the same as the issue that would be decided by the NLRB, the state is not divested of jurisdiction. *Sears, Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S.180, 197 (1978). Petitioners concede this standard applies to the analysis of the issues in this case. Pet. at 14.

In this case, the Union Representatives entered the job sites to look for violations of laws that require contractors to provide safe and healthful working conditions for their

employees and to determine Rainbow's compliance with the State's prevailing wage statutes on public works. They were arrested by the Petitioners and allegedly subjected to wrongful and baseless criminal prosecution for engaging in this lawful union activity. The state torts arising here are false arrest, false imprisonment, and malicious prosecution.

Under this scenario, the Board's analysis of a potential unfair labor practice is not identical to a court's analysis of the torts at issue. The question before the Board would be whether Rainbow had interfered with the Union Representatives' protected § 7 rights to engage in the health and safety and prevailing wage inspections, or (depending on which party filed the charge), whether the Union Representatives had violated § 8(b) of the Act by entering the property in pursuit of some unlawful objective. Contrarily, a court's inquiry would focus on whether Rainbow had violated the Union Representatives' state-protected right to be free from arrest without probable cause and had maliciously caused the Union Representatives to be subjected to a baseless criminal prosecution.[9]

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[9] Petitioners insist that the courts would be forced to consider the nature of the alleged trespassers' conduct and whether that conduct would be permitted under the NLRA. Petitioners' contention is speculation. The California Legislature did not define the Penal Code § 602(n) labor exemption as a *defense* to trespass; the trespass statute simply does not apply to the labor conduct. Therefore, any property owner accused of false arrest may be required to prove affirmatively that he had probable cause to believe the arrestee's conduct was forbidden by the NLRA or some other law at the time of the arrest. *See In re Catalano*, 29 Cal.3d at 15 (if a union representative goes beyond the scope of lawful union activity by interfering with the construction work or damaging the property, the owner may properly insist that he or she leave). Under this scenario, the court's primary focus would be the alleged false arrestor's *knowledge* of the union representatives' conduct before the citizen's arrest was effected—there need be no analysis of the union representatives' conduct nor its status under the NLRA.

Rainbow argues that the Union Representatives' claims will "turn on whether . . . they were 'engaged in lawful union activities'," and that this is identical to what would be the Board's focus. Pet at 15. This artful use of the phrase "turns on" obscures the state of the law. Under the case law, "identical" means "identical." *See, e.g., Sears*, 436 U.S. 180 (where court's focus would be on location of picketing and Board's focus would be on object of picketing, issues are not identical); *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1983) (where Board's focus would be infringement of strikers' rights and court's focus would be misrepresentations to replacement workers, controversies cannot fairly be called identical); *Local 926, Int'l. Union of Operating Engineers v. Jones*, 460 U.S. 669, 882 (1983) (where Board's focus would be whether union caused the employee's discharge and court's focus would be whether union's actions caused interference with employee's contractual relationship, issues can be said to be identical).

As stated above, a court's inquiry would focus on whether Rainbow had violated the Union Representatives' right to be free from arrest without probable cause and malicious prosecution. The mere fact that a court may look to NLRB case law to resolve a question does not necessitate preemption. To the extent that a court must consider federal labor law at all, it is clearly a collateral issue and would fall within the well-recognized "collateral issue" exception to *Garmon* preemption. *See Garmon*, 359 U.S. at 243; *Bud Antle v. Barbosa*, 35 F.3d 1355, 1361 (9th Cir. 1994); *Hayden v. Reickerd*, 957 F.2d 1506, 1512 (9th Cir. 1991). This exception derives from the doctrine that federal courts may decide labor questions that emerge as collateral issues in litigation based on independent legal obligations. *See Connell*

Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616, 626 (1975).[10]

B. California has a right and an obligation to protect its residents from the personal injuries attendant to false arrest, false imprisonment, and malicious prosecution, therefore, preemption is unwarranted.

The legal significance of the state's interest in protecting its citizens from tortious conduct is paramount where the alleged injury "touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of power to act." *Garmon*, 359 U.S. at 243-44; *see also Farmer*, 430 U.S. at 304 ("the potential for interference [with the federal labor scheme] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens").

Rainbow cites *Linn v. Plant Guard Workers*, 383 U.S. at 64 ("The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, undercuts the ordinary arguments for preemption") but fails to grasp its import. Where, as here, an adjudication by the Board that the employer had engaged in an unfair labor practice and an injunction prohibiting such activities in the future would provide little redress to individuals who suffered the personal indignities attendant to arrest, lengthy prosecution, and the threat of incarceration.

On this score, the Ninth Circuit was justified in recognizing the state law torts of false imprisonment, false arrest, and malicious prosecution as matters of local responsibility,

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[10] *Garmon* preemption applies both to state and federal courts. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982).

peripheral to the concerns of the NLRA. The Board would have no concern about the personal injuries resulting from such actions but would involve itself only with the interference with the Union Representatives' protected activities. The means of the interference, *i.e.*, by false arrest, imprisonment, and lengthy unwarranted prosecution, would be irrelevant.

C. Preemption of the 42 U.S.C. § 1983 claim does not control preemption of the state torts.

Petitioners express incredulity that the Ninth Circuit could reach differing conclusions as to the preemption of the § 1983 claims and the state torts. Pet. at 10, 18. Petitioners have confused the Ninth Circuit's analysis of the various preemption issues presented to it. Although Petitioners imply that each of the Union Representatives' § 1983 claims were found to be preempted by the NLRA, in fact, the Circuit Court allowed the § 1983 claims against the governmental entities to stand (Pet. at 11a),[11] as well as the § 1983 claims predicated on constitutional violations as against all defendants, including Rainbow (Pet. at 13a-14a).[12] *Only* the § 1983 claim predicated on deprivation of rights under § 7 of the NLRA as against *Rainbow* was found preempted (Pet. at 11a-13a).

The reasoning that led to the preemption of the § 1983 claim does not, however, dictate the preemption of the state torts. The § 1983 claim based on the deprivation of the Union

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[11] The § 1983 claims against the governmental entities fell due to the district attorney's prosecutorial immunity and a lack of evidence for the alleged conspiracy. Pet. at 14a-17a. The claims were not preempted.

[12] The Union Agents' constitutional claims against Rainbow fell because the Ninth Circuit found insufficient evidence of a conspiracy with a state actor—a requirement for stating a § 1983 claim against a private individual. Pet. at 17a-20a. The § 1983 claims against Rainbow were found legally insufficient—not preempted.

Representatives' § 7 rights by the employer was preempted under *Garmon* because the legal question to be decided by the court was identical to the issue that would have been decided by the NLRB, *i.e.*, whether Rainbow had interfered with the Union Representatives' rights under § 7. The Union Representatives' effort to cast a straight-out unfair labor practice charge as a § 1983 violation fell to the NLRB's exclusive jurisdiction over such issues.

Contrarily, the claims addressing the *means* by which the interference was accomplished, *i.e.*, false arrest, imprisonment, and malicious prosecution, are not preempted. The means Rainbow employed to effect the interference constituted personal injuries to the Union Representatives. As stated above, these personal injuries would not be addressed by the Board, would not present identical questions to the Board as to a court, and "touch[] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of power to act." *Garmon*, 359 U.S. at 243-44. Thus, the reasoning dictating the § 1983 claim's preemption simply does not lead to the identical conclusion with regard to the state tort claims.

D. Petitioners' confound *Garmon* and § 301 preemption doctrines when they argue that the state torts are "artfully pled" unfair labor practices.

Rainbow blurs concepts drawn from cases interpreting *Garmon* and Section 301 (29 U.S.C. § 185) preemption. For example, Rainbow invokes the "artful pleading" doctrine which applies to Section 301 preemption but has never been applied to *Garmon* preemption. Pet. at 19 fn.9. Rainbow's complaint that the Ninth Circuit's decision enables unions to recharacterize an unfair labor practice charge as a state court claim might also be made with respect to all state torts that

can be characterized as unfair labor practices. But this Court and others have long since recognized that state jurisdiction should not be ousted with respect to compelling local interests involving injury to persons including violence, defamation, and intentional infliction of emotional distress. This case involves precisely such injury to individuals who were subjected to imprisonment, arrest, and prosecution that they claim was unlawful.

In rejecting removal under *Garmon* preemption, courts have repeatedly ruled that *Garmon* preemption is a defense, not a basis for recharacterizing state law torts as "artfully pled" federal causes of action (as is § 301). *See, e.g., Ramsay v. Steeltech Mfg., Inc.*, 895 F.Supp. 225 (E.D. Wis 1995) (unlike § 301 preemption, Garmon preemption does not create jurisdiction in federal courts—if Garmon applies both state and federal courts lack jurisdiction); *see also TKO Fleet Enterprises, Inc. v. District 15 Int'l Assn of Machinist & Aerospace workers, AFL-CIO*, 72 F.Supp. 2d 83, 87 (E.D. N.Y. 1999) (collecting cases). Petitioners' confusion of the two analytical legal frameworks does no service to this Court's inquiry.

IV. CALIFORNIA'S LABOR EXEMPTION TO ITS TRESPASS STATUTE DOES NOT DENY EMPLOYERS ACCESS TO THE NLRB.

Rainbow's dire predictions of the consequences if the Ninth Circuit's decision is allowed to stand are equally mistaken. Rainbow asserts that the Ninth Circuit's decision "denies California employers any means of accessing the NLRB's jurisdiction to determine whether a union's activity on the employer's California property is protected or prohibited under the NLRA." Pet. at 21. This is erroneous. The employer is free to bring a charge before the Board and obtain precisely such adjudication. Rainbow writes that "[i]f an employer tries to enjoin a trespass, a union can cite

California Penal Code § 602(n) and have the state determine whether, in its view, the NLRA would permit such conduct." Why an employer who wants adjudication by the Board would seek an injunction in state court is a mystery. The NLRB is empowered by Section 10(j) (29 U.S.C. § 160(j)) to seek an injunction in federal court against union activity prohibited under the Act. Such an injunction is enforceable by contempt proceedings. The employer would have the benefit of the injunction until the Board could adjudicate the unfair labor practice charge, at which point the Board would decide upon the final remedy. The alleged dilemma of California employers being forced to submit questions of interpretation of the NLRA to California courts is imaginary.

V. BECAUSE NLRA PREEMPTION OF CALIFORNIA'S TRESPASS STATUTE WAS NOT AN ISSUE BEFORE THE NINTH CIRCUIT, IT IS NOT PROPERLY BEFORE THIS COURT.

This Court should deny Petitioners' request that the Court review the validity of California's trespass statute. Before the Ninth Circuit, Petitioners argued *only* that the Union Representatives' 42 U.S.C. § 1983 and state tort claims are preempted by the NLRA. A general preemption of California's exemption from its trespass statute for "persons engaged in lawful labor union activity" (Cal. Penal Code § 602(n)) was not properly an issue before that court,[13] and therefore, is not properly before this Court.

Petitioners' "Statement of Issues" before the Ninth Circuit included two preemption issues, neither implicating § 602(n) generally:

> 2. Is Appellants' federal claim against Rainbow, brought pursuant to 42 U.S.C. § 1983 and alleging an

[13] Petitioners had proffered the issue at the trial level on a Rule 12(b)(6) motion, which was denied.

underlying violation of rights under Section 7 of the NLRA, within the primary jurisdiction of the National Labor Relations Board?

3. Are Appellants' state law causes of action for false arrest and malicious prosecution preempted by the NLRA, in that they necessarily require litigation of an alleged unfair labor practice, and are premised on an interpretation of California Penal Code § 602(n), which purportedly expands union rights of access under the NLRA in California? [14]

The Ninth Circuit squarely addressed these two preemption issues in rendering its decision. *See* Pet. at 10a-14a (concerning the § 1983 claims) and Pet. at 20a-26a (concerning the state tort claims). That court did not, however, address a general preemption of the state trespass statute, because that issue had not been raised.

This Court routinely has rejected cases where the petitioner has failed to raise the presented issue or issues to the court of appeals. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Carroll v. United States*, 354 U.S. 394 (1957). This course should be followed in the present case as well.

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[14] Amended Brief of Appellee Rainbow Construction Company (filed 9/22/99) at 5-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SANDRA RAE BENSON *
MICHAEL B. ROGER
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
A Professional Corporation
180 Grand Avenue, Suite 1400
Oakland, California 94612
(510) 839-6600

* Counsel of Record

Counsel for Respondents